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eu daimonia*

Revija za pravnu, političku i
socijalnu teoriju i filozofiju

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REVIZIJA ISTORIJE U ZAKONODAVSTVU I SUDSTVU: SLUČAJ RAVNOGORSKOG POKRETA

JUDGES AND EXCEPTIONS: DEFEASIBILITY OF NORMS BY JUDICIAL ACT

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DISTINGUISHING IN STATUTORY LAW. THE STATUTE AS WRITTEN CUSTOM UNDER
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* Eudaimonia (Greek: εὐδαιμονία [eudaimoníia]) is a Greek word commonly translated as happiness or welfare; however, "human flourishing" has been proposed as a more accurate translation. Etymologically, it consists of the words "eu" ("good") and "daimōn" ("spirit"). It is a central concept in Aristotelian ethics and political philosophy, along with the terms "aretē", most often translated as "virtue" or "excellence", and "phronesis", often translated as "practical or ethical wisdom". In Aristotle's works, eudaimonia was (based on older Greek tradition) used as the term for the highest human good, and so it is the aim of practical philosophy, including ethics and political philosophy, to consider (and also experience) what it really is, and how it can be achieved.

eudaimonia

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REVIZIJA ISTORIJE U ZAKONODAVSTVU I SUDSTVU: SLUČAJ RAVNOGORSKOG POKRETA***

Period posle 2000. godine u Srbiji značio je potpuni ideološki zaokret, zbog koga je usledilo i donošenje niza zakona sa jasnom ideološkom porukom. Legitimizacija četničkog pokreta nije sprovedena samo na društvenom planu, već najviše na političkom i to preko sudske vlasti, koja je legitimizaciji dala pravni oblik i pravno utemeljenje. Drugim rečima, desila se zloupotreba zarad političkih odluka. U ovom radu analiziraćemo kako je Zakon o pravima boraca, vojnih invalida i članova njihovih porodica od 1989. godine izmenjen od strane zakonodavca sa drugim ideološkim opredeljenjem. Naime, 2004. godine izvršene su gotovo besmislene izmene i dopune tog zakona. One uvode potpuno novo rešenje, što sigurno nije bila namera zakonodavca 1989. godine, priznajući pravo na mesečno novčano primanje i pripadnicima četničkog pokreta. Pitanje koje se ovde postavlja je da li zakon koji je toliko izmenjen, da očigledno predstavlja potpunu promenu prvobitne namere zakonodavca, uopšte treba da važi? Ali, još važnije, da li je sudija u stanju da takvu promenu uopšte isprati i donese „pravednu“ odluku?

Ključne reči: revizionizam, Zakon o pravima boraca, četnički pokret, zloupotreba vlasti, Dragoljub Mihailović.

1. UVOD

Kada je 2005. godine u francuskom časopisu *Libération* objavljena „proklamacija“ pokreta *Liberté pour l'histoire* (Sloboda za istoriju – prim. aut.),¹ to je izazvalo prilično oštre polemike. Naime, pomenuti pokret

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¹ Videti: https://www.lph-asso.fr/index34d1.html?option=com_content&view=article&id=2&Itemid=13&lang=fr [21. novembar 2019]

objavio je jedan pamflet u kome se pobunio protiv tri zakona² koje je doneo francuski parlament, smatrajući da se njima ograničava sloboda istorijskog istraživanja, ali i da se kroz pravo nameću zaključci do kojih istorijska nauka nije došla. Ta proklamacija bila je podržana od velikog broja istoričara, a na čelu sa Pjer Norom (*Pierre Nora*). Oni su smatrali da se time krše svi osnovni principi – od slobode misli do slobode izražavanja (Stojanović 2017). Međutim, ovo nije bio slučaj samo u Francuskoj. Čak bi se moglo reći da je reč o evropskom trendu. Tako, 1996. godine, Parlamentarna skupština Saveta Evrope donela je Rezoluciju 1096³ o merama razgradnje bivših komunističkih totalitarnih režima. Potom, 2006. godine donela je Rezoluciju 1481⁴ o potrebi osude zločina totalitarnih i komunističkih režima. Ono što je uočljivo u svim ovim aktima jeste relativizacija prošlosti, selektivnost (Milošević 2013, 18; 18 fn. 27) i uređivanje materije u pravnoj formi, dajući „pravnu snagu“ i pravni autoritet jednom pogledu na prošlost.

Ta praksa donošenja zakona kojima se propisuju narativi o prošlosti koje država podržava kao „zvanično sećanje“ (Stojanović 2017) nije zaobišla ni Srbiju. Štaviše, bila je vrlo intenzivna. Kultura sećanja je inače osetljivo pitanje, ali je u Srbiji to dovelo do velikih podela i neslaganja, uzimajući u obzir specifično jugoslovensko iskustvo. Naime, Jugoslavija je imala svoj „poseban“ Drugi svetski rat (u kome je pobeda bila trostruka: nad okupatorom, nad kolaboracionistima i pobeda komunizma), a njen raspad, s obzirom na multietničku strukturu, nužno je značio i prekrajanje takvog multietničkog prostora (Stojanović 2017). U tom kontekstu, dvehiljaditih, usledilo je donošenje niza zakona koji „diraju“ u materiju istorije, a istovremeno „politizuju“ pravo kao sredstvo uređenja društvenih odnosa.

² Loi n° 90–615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe (Zakon o suzbijanju svih akata rasizma, antisemitizma ili ksenofobije) – neformalno loi Gayssot

Loi n° 2001–70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915 (Zakon o priznavanju jermenskog genocida 1915. godine) – neformalno loi Arménie

Loi n° 2001–434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l’esclavage en tant que crime contre l’humanité (Zakon koji tretira ropstvo kao zločin protiv čovečnosti) – neformalno loi Taubira

³ Resolution (COE) No. 1096/1996, Measures to dismantle the heritage of former communist totalitarian systems

⁴ Resolution (COE) No. 1481/2006, Need for international condemnation of crimes of totalitarian communist regimes

Jedan od takvih propisa bio je i Zakon o pravima boraca, vojnih invalida i članova njihovih porodica (dalje: Zakon o pravima boraca)⁵ od 2004. godine (u formi izmena i dopuna ranijeg zakona) kojim se boračka prava priznaju i pripadnicima ravnogorskog pokreta. Njime se bitno ušlo u područje promene slike o prošlosti. Pored ovog donet je i niz drugih zakona, ali ovaj posmatramo kao onaj koji je stvorio osnovu za to. Tema postaje još značajnija kada se uzme u obzir da je 2019. predložen i Nacrt Zakona o pravima boraca, vojnih invalida, civilnih invalida rata i članova njihovih porodica, koji je u februaru 2020. godine i usvojen (dalje: Novi Zakon o pravima boraca).⁶ Kako ističe Stojanović, „pažljivo rukovanje prošlošću nisu zakoni i, budući da su društva „memorijski pluralna“, zakonsko propisivanje znači da će sećanja drugačija od „legalnih“ biti potisnuta na marginu, gde će čekati svoju novu priliku, a slučajevi kada se ta nova šansa pojavila obično su vrlo dramatične ili revolucionarne promene u jednom društvu, kada postoji opasnost da se u opštoj konfuziji otvori prostor za identifikaciju s opasnim memorijskim sadržajima koji produbljuju konflikt“ (Stojanović 2017), pa ćemo u skladu sa tim pokušati da identifikujemo mesta na kojima zakonodavac ulazi u oblast istorije i istu „menja“ zarad određenih političkih ciljeva. Ta analiza će biti dvostruka, pravna i istorijska, ali ne sa ciljem da pruži nova istorijska znanja, već da pokaže da se prošlost ne može urediti zakonima i da se „prošla stvarnost“ ne može koristiti u dnevnopolitičke svrhe. Pored toga, cilj je pružiti adekvatnu teorijsku analizu jednog načina zloupotrebe prava i nadležnosti zakonodavca. Time se otvara i pitanje položaja sudija prilikom donošenja odluka koje su zasnovane na pomenutim zakonima jer onda oni moraju da se bave „vanpravnim“, njima načelno nepoznatim temama.

U prvom delu rada ćemo ispitati eventualne veze između prava i politike i dati određena terminološka preciziranja. Potom, analiziraćemo praksu istorijskog revizionizma u Srbiji, posebnu pažnju posvećujući Zakonu o pravima boraca. Na kraju, pokušaćemo da odgovorimo kakve su eventualne veze između pravosuđa, i to pre svega rada sudija, i odluka koje donose, prateći zakone koje je doneo zakonodavac.

⁵ Zakon o pravima boraca, vojnih invalida i članova njihovih porodica, *Službeni glasnik SRS* 54/1989, *Službeni glasnik RS* 137/2004, Odluka US 69/2012, 50/2018

⁶ Zakon o pravima boraca, vojnih invalida, civilnih invalida rata i članova njihovih porodica, *Službeni glasnik RS* 18/2020

2. ODNOS ZAKONODAVCA PREMA ZAKONU

Hans Kelzen, razmatrajući pojam norme, između ostalog, govori o tzv. „volji zakonodavca“. On ističe da, pošto su članovi parlamenta doneli zakon, prelaze na druga pitanja i „prestaju da hoće sadržaj zakona“ (2010, 108). Naime, prema Kelzenu, postojanje norme nije psihološki fenomen, pa pravo postoji čak i kada oni pojedinci koji su ga stvorili ne žele više sadržinu zakona (2010, 108–109). Iako je ovaj stav prema kome zakon nadživljava tvorca-zakonodavca sasvim tačan, smatramo da je neophodno preciziranje. Nema sumnje da „smrt“ (a za pravo promena) zakonodavca ne znači i prestanak važenja tog zakona. Stabilnost pravnog poretka se ogleda upravo u „trajnosti“ zakona. Ipak, volja zakonodavca koji je određeni zakon doneo je naročito značajna sa aspekta tumačenja. Često se zakoni donose u specifičnim okolnostima, a njihov „jezik“ u velikoj meri zavisi i od cilja koji se želi postići njima. U tom smislu, ipak treba poznavati poziciju zakonodavca. To je od naročitog značaja i za sudiju. U trenutku donošenja odluke poznavanje namere zakonodavca može pomoći u rasuđivanju prava.

Ipak, iz prirode vlasti proizlazi mogućnost zakonodavca da stare zakone zameni novim. Sa druge strane, i samo društvo može da u jednom trenutku prihvati jedno pravilo, ali to i dalje neće garantovati njegovo neprekidno postojanje (Hart 2013, 118). U prirodi je suverena, kako ističe Hart, da za njegovu moć stvaranja prava nema bilo kakvih ograničenja (2013, 125). Ipak, ovoj opštoj teoriji se prigovara da postoje „pravna ograničenja“ njegove zakonodavne vlasti (Hart 2013, 128–130). Hart (2013) njih posmatra ne kao dužnosti, već pre nemogućnosti za donošenje pojedinih zakona. Nas, međutim, interesuje iz kojih pobuda zakonodavac donosi određeni zakon i da li u tom smislu postoje izvesna ograničenja.

Pravo i politika su u tesnoj međusobnoj vezi. Stoga, logično je, a i proizlazi iz onoga što smo prethodno rekli, da zakonodavac upravo može da koristi svoju nadležnost donošenja zakona da kroz iste „promoviše“ određenu politiku. Jedan od teorijskih stavova, koji mi ovde i prihvatamo, jeste da je pravo sredstvo i to najvažnije sredstvo za ostvarivanje političkih ciljeva (videti Stanković 1998, 217). Tako, česta je politička borba ne samo oko načina uređenja društvenih odnosa, već i oko toga koji će uopšte društveni odnosi biti regulisani (Stanković 1998, 217). Srbija bi mogla biti paradigma toga. Naime, posle Drugog svetskog rata nova država je postala socijalistička. To je značilo

potpunu promenu u brojnim društvenim odnosima. Tako su stvarani novi narativi u svim oblastima, pa i u oblasti politike sećanja. Međutim, devedesetih godina došlo je da nasilnog raspada takve države, ali i istovremeno do sloma socijalizma, što je značilo i promenu narativa. To je otvorilo prostor novim vlastima da sada pravo upotrebe za postizanje novih političkih ciljeva. U oblasti politike sećanja posleratna Jugoslavija je imala jasno antifašističko opredeljenje. Ono je, međutim, bitno relativizovano u periodu posle 5. oktobra 2000. godine. Zakonodavac se „poslužio“ svojom nadležnošću, ali je pitanje koje su granice u propisivanju zakona. Promena prošlosti zarad političkih ciljeva nije nepoznata, ali jedno nesporno ograničenje za zakonodavca morala bi predstavljati istorijska istina. Time on biva ograničen znanjima do kojih dolazi istorijska nauka i dužan je da ih poštuje. Ako ih prenebregne, time je već na terenu zloupotrebe svoje nadležnosti.

Dakle, od naroda izabrani zakonodavac jeste nadležan da donosi zakone određene sadržine, ali ta sadržina ne sme da protivreči činjenicama do kojih nauka dolazi. I ne samo to. Iako pravo jeste sredstvo politike (i sme to da bude), ono je to u ograničenoj meri. Sve preko toga predstavlja zloupotrebu.

Pošto smatramo da je srpski zakonodavac upravo zloupotrebio svoju nadležnost, donoseći zakone kojima istovremeno zloupotrebljava istorijska znanja, treba naglasiti da je to deo šire pojave revizionizma. Stoga, neophodno je precizirati taj pojam.

3. REVIZIONIZAM

Pojam revizionizam u prošlih vek i po korišćen je da označi najraznovrsnije promene u posmatranju određene paradigme ili istorijskog događaja. Tako su revizionistima, između ostalih, nazivani i nerevolucionarni marksisti, i ljudi koji su poricali nemačku krivicu za izbijanje Prvog svetskog rata, ali i oni koji su poricali Holokaust (Milošević 2013, 11–12). Srpski istoričar Srđan Milošević se, pišući umesto predgovora zbornika „Politička upotreba prošlosti“ o pojmu istorijskog revizionizma, opredelio za tumačenje pojave istorijski revizionizam kao isključivo negativne: „i da [istorijski revizionizam – prim. aut.] kao naučni termin označava samo onu vrstu promene u odnosu prema prošlosti za koju se može tvrditi da niti počiva na naučno valjanim temeljima, niti je u saglasnosti sa bitnim društvenim vrednosti-

ma.“ (Milošević 2013, 15–16) Prihvatajući ovo pojmovno određenje, u radu ćemo pod pojmom revizionizma podrazumevati upravo promene tumačenja istorijskih događaja sa namerom da se nenaučnim putem dođe do političkog ili na bilo koji drugi način nenaučnog cilja.

4. PRAVO KAO INSTRUMENT ISTORIJSKOG REVIZIONIZMA

Najintenzivniju zakonodavnu aktivnost koja je u vezi sa opasnom zloupotrebom istorijske istine imao je saziv Narodne skupštine od 2004. godine. Hronološki, prvo su donete izmene i dopune Zakona o pravima boraca 2004. godine, potom Zakon o prijavljivanju i evidentiranju oduzete imovine (dalje: Zakon o prijavljivanju imovine)⁷ 2005. godine, Zakon o vraćanju (restituciji) imovine crkvama i verskim zajednicama⁸ 2006. i konačno, Zakon o rehabilitaciji⁹, takođe 2006. godine. Skupštinski saziv od 2008. godine, doneo je 2011. godine novi Zakon o rehabilitaciji¹⁰ i Zakon o vraćanju oduzete imovine i obeštećenju¹¹, a onaj od 2016. novi Zakon o pravima boraca, 2020. godine.

Donošenje ovih zakona proteklo je u atmosferi neophodnosti prevladavanja autoritarne prošlosti. Posle dvehiljaditih, u Srbiji, pod tim režimima podrazumevaju se režim Josipa Broza Tita i Slobodana Miloševića. Kako ističu zagovornici ovog stava (Trkulja 2008, 11 i dalje), jedan od najvažnijih elemenata tog „prevladavanja“ je putem prava. Razume se, u procesu konstituisanja pravne države i vladavine prava, vrlo je važno urediti brojna pitanja, ali ključno je dokle su granice do kojih može ići zakonodavac. Pitanja rehabilitacija (kao osnov pravnog uređenja oblasti ljudskih prava) i restitucija (kao osnov pravnog uređenja svojinskih odnosa) su nesporno u polju onih oblasti koja pravna država mora da reguliše (Trkulja 2008, 11–21). Ali, čak i tada, pravo se može služiti samo „jezikom prava“ i ne sme da donosi „istorijske istine“. I ne samo to, problem je postojao i u naučnim krugovima.

⁷ Zakon o prijavljivanju i evidentiranju oduzete imovine, *Službeni glasnik RS* 45/2005, 72/2011

⁸ Zakon o vraćanju (restituciji) imovine crkvama i verskim zajednicama, *Službeni glasnik RS* 46/2006

⁹ Zakon o rehabilitaciji, *Službeni glasnik RS* 33/2006

¹⁰ Zakon o rehabilitaciji, *Službeni glasnik RS* 92/2011

¹¹ Zakon o vraćanju oduzete imovine i obeštećenju, *Službeni glasnik RS* 72/2011, 108/2013, 142/2014, 88/2015, Odluka US 95/2018

Govoriti o autoritarnoj prošlosti podrazumeva pre svega utvrđivanje da li je prošlost autoritarna, i to na osnovu jasnih kriterijuma. Dakle, pravo je bilo mnogo više od, kako ističu pomenuti autori, elementa prevladavanja prošlosti – ono je zapravo jedan od glavnih elemenata njene zloupotrebe.

Problem u Srbiji nije postojao samo na planu ideološke ostrašćenosti (ali istovremeno, paradoksalno, i ideološke neodređenosti), već i na nomotehničkom planu. Naime, većina ovih zakona predstavljaju potpune promašaje u pravno-tehničkom smislu, a ništa nije manji broj nedostataka i u sadržinskom (Vodinelić 2008, 44; Trkulja 2008; Dulić 2012, 631–632).

Čak i iz ugla istoričara, a naročito pravnika, bilo je vrlo važno regulisati imovinsko-pravna pitanja. Pravi način za to bio je upravo putem donošenja zakona o restituciji. Prva vlada Vojislava Koštunice je podnela predlog, a kasnije je od Parlamenta i usvojen Zakon o prijavljivanju imovine. Njime je, međutim, regulisano samo pitanje prijavljivanja i evidentiranja oduzete imovine. Sledeći korak bilo je donošenje Zakona kojim će se denacionalizacija potpuno sprovesti. Međutim, Predlog zakona o denacionalizaciji od 2007. godine pretrpeo je tolike kritike da je odbačen (videti Vodinelić 2008). Tako je Zakon koji uređuje ovo pitanje donet tek 2011. godine, toliko kasno da je pitanje uređenja vraćanja oduzete imovine i dalje otvoreno, a u mnogim slučajevima i neadekvatno rešeno.

Međutim, najviše medijske pažnje (ali i stručne) privuklo je donošenje Zakona o rehabilitaciji. Ovaj Zakon je gotovo paradigma zloupotrebe prava, ali i mešanja zakonodavca u pitanja istorije – ona pitanja za koja je od početka jasno da će ih pogrešno urediti. I ne samo to. Zakon o rehabilitaciji je značajan i zbog uloge sudova i sudija, koje smo gore pomenuli. Naime, da li sudije sude pogrešno ili im je nametanjem loših zakona nametnuta i obaveza donošenja pogrešnih odluka? Ovaj Zakon donet je 2006. godine i u stručnoj javnosti ostao je upamćen kao vrlo loš (tako važno pitanje regulisao je kroz svega 9 članova). Cilj je bio sprovesti rehabilitaciju „političkih osuđenika“ u užem smislu. Jedan od drastičnih primera kako je ovaj Zakon imao čisto ideološku funkciju izmene svesti i rehabilitacije, pre svega, četnika, može se videti i na osnovu toga da je praktično omogućio i rehabilitaciju ratnih zločinaca (Dulić 2012, 631). Zato je posle niza kritika donet novi Zakon o rehabilitaciji 2011. godine, koji je ovu materiju bolje uredio. Međutim, ovde je problem nastao u primeni. Naime, na osnovu

ovog zakona rehabilitovan je Dragoljub Mihailović. Tu su se ispoljile sve slabosti pravosuđa u oblasti političkih rehabilitacija, ali je isto tako postalo jasno da je jedina uloga niza ovih zakona umanjivanje istorijskog značaja, pa čak i potpuna kriminalizacija socijalističke prošlosti i jugoslovenskog iskustva (Milošević 2013, 23–24; 2012, 75). Stoga, ovi zakoni imaju mnogo važniju funkciju – preoblikovanje svesti građana kroz prerađivanje prošlosti, a kao izvor legitimnosti novih društvenih snaga (Milošević 2013, 23).

O Zakonu o rehabilitaciji postoje brojna relevantna istraživanja. Još su brojnije vrlo argumentovane analize koje jasno utvrđuju nelegitimnost, nelegalnost i istorijsku neutemeljenost rehabilitacije Dragoljuba Mihailovića (videti, na primer, Bešlin 2013, 83–102; Radanović 2012; Sekulović 2013). Zato ćemo ovde dati detaljnu analizu onih delova Zakona o pravima boraca od 1989. godine sa izmenama i dopunama od 2004, koji su zapravo „kamen temeljac“ zloupotrebe prava i istorije i koji je omogućio donošenje svih potonjih zakona sa novim ideološkim opredeljenjem i novom Zakonu o pravima boraca od 2020. godine, a koji predstavlja zaokruženje tog procesa istorijskog revizionizma, bar kroz zloupotrebu prava.¹²

4.1. Zakon o pravima boraca: „osnov“ promene istorijske svesti

Zakon o pravima boraca donet je 1989. godine, kao zakon republičkog ranga za SR Srbiju. Njime je bilo regulisano ostvarivanje prava predviđenih Zakonom o osnovnim pravima vojnih invalida i porodica palih boraca¹³ donetim 1981. godine, a koji je bio zakon saveznog ranga. Kasnije, 1998. godine donet je nov Zakon o osnovnim pravima boraca, vojnih invalida i porodica palih boraca,¹⁴ opet kao zakon save-

¹² Predmet naše analize su samo pojedine odredbe u kojima vidimo potencijalnu zloupotrebu istorije kroz pravo, a ne sve odredbe, koje spadaju u oblast socijalnog prava.

¹³ Zakon o osnovnim pravima vojnih invalida u porodica palih boraca, *Službeni list SFRJ* 68/1981, 41/1983, 75/1985, 44/1989, 20/1990, 42/1990

¹⁴ Ustavni sud je u svojoj odluci, između ostalog, raspravljao i o odnosu ova dva zakona. Naime, nakon uspostavljanja unitarne države, prestaje potreba za paralelnim, saveznim i republičkim uređenjem ove oblasti. Ipak, Zakon o prestanku važenja pojedinih zakona od 2004. godine nije predvideo izričito i prestanak Zakona o osnovnim pravima boraca. Pored toga, Ustavni sud nalazi da nema sukoba između ova dva zakona ni u sadržinskom smislu, pošto se „smetnje za sticanje i korišćenje prava utvrđenih članom 74. saveznog Zakona odnose isključivo na prava boraca, vojnih invalida

znog ranga (sada za Saveznu Republiku Jugoslaviju)¹⁵, čime je prestalo važenje prethodnog saveznog Zakona. U vreme SRJ nisu vršene izmene u Zakonu o pravima boraca. Do prvih izmena je došlo 2004. godine u formi Zakona o izmenama i dopunama Zakona o pravima boraca, vojnih invalida i članova njihovih porodica (dalje: ZID Zakona o pravima boraca) i one su potpuno promenile prvobitni smisao ovog zakona.

Svi pomenuti zakoni uređuju oblast socijalne, odnosno bliže, boračke zaštite. U nastavku analize, osvrnućemo se na one delove pomenutih zakona koji su potencijalno sporni, kako sa stanovišta istorijske nauke, tako i u nomotehničkom smislu.

Da bi se razumela određena norma, neophodno je posmatrati je u određenom kontekstu. Jezikom prava, neophodno je služiti se sociološkom metodom tumačenja. Dakle, u obzir se mora uzeti cilj određenog propisa, ali i sve druge relevantne društvene okolnosti pod kojima i u okviru kojih je donet određeni propis (Lukić 1985, 365; Mitrović 2014, 275). Pored toga, značajan je i kontekst u kome se nalaze pravne norme (Vasić, Jovanović, Dajović 2014, 336). Taj zadatak je naročito složen u pogledu pomenutih zakona. Naime, Zakon o pravima boraca usvojila je Skupština Socijalističke Republike Srbije na sednici Veća opština 1989. godine. Treba uzeti u obzir da je to i dalje vreme izražene antifašističke orijentacije na društvenom i političkom planu uz odbacivanje svake relativizacije fašizma, iako je to dve godine nakon dolaska Slobodana Miloševića na vlast. Ovakva orijentacija podrazumevala je i odbacivanje teze o četničkom pokretu kao antifašističkom. Shodno tome, čl. 2 Zakona predviđene su kategorije lica kojima se pruža zaštita i priznaju prava zajemčena ovim i tadašnjim saveznim Zakonom o osnovnim pravima vojnih invalida i porodica palih boraca koji je donet 1981. godine. Tako, to pravo je zajemčeno borcima Narodnooslobodilačkog rata (a to su lica koja su stupila u Narodnooslobodilački rat – NOR pre 1. januara 1944. godine (muškarci), odnosno pre 1. januara 1945. godine (žene), ako im je vreme od dana stupanja u Narodnooslobodilački rat do 15. maja 1945. godine priznato u poseban staž u dvostrukom trajanju po propisima o penzijskom i invalidskom osiguranju radnika /st. 1/), odnosno učesnici ranijih ratova za oslobođenje zemlje

i porodica palih boraca propisana tim zakonom i ne odnose se na ostvarivanje prava navedenih lica koja su utvrđena republičkim zakonom⁶, vid. Ustavni sud, *Službeni glasnik RS* 69/2012, para. 16 (obrazloženja)

¹⁵ Zakon o osnovnim pravima boraca, vojnih invalida i porodica palih boraca, *Službeni list SRJ* 24/1998, Odluka SUS 16/2000, *Službeni glasnik RS* 101/2005, 111/2009, 50/2018

(učesnici Balkanskih ratova, Prvog svetskog rata, dobrovoljci Solunskog fronta, učesnici u Topličkom ustanku 1917. godine i pripadnici oružanih snaga bloka država u kome su se nalazile Srbija i Crna Gora /st. 2/). ZID Zakona o pravima boraca od 2004. godine je najspornije izmene imao upravo u drugom članu. Naime, on je dodao stav 3 i 4. St. 3 predviđeno je da „status borca NOR-a [...] imaju i pripadnici Jugoslovenske vojske u otadžbini i Ravnogorskog pokreta, počev od 17. aprila 1941. do 15. maja 1945. godine“, a st. 4 da „način utvrđivanja statusa lica iz stava 3. ovog člana uređuje Vlada Republike Srbije“ (čl. ZID Zakona o pravima boraca). Pomenutim izmenama i dopunama je, dakle, bitno proširen krug lica koja ostvaruju prava iz oblasti boračke zaštite i to tako da je obuhvatio ona lica koja su u očima zakonodavca od 1989. godine bila dokazani narodni neprijatelji. Ovo je sporno sa jedne strane, iz ugla nomotehnike i prava, a sa druge iz ugla istorije. Naime, jezičkim tumačenjem ove norme dolazimo do zaključka da se sva prava koja imaju pripadnici NOR-a priznaju i pripadnicima Ravnogorskog pokreta, odnosno pripadnicima Jugoslovenske vojske u otadžbini. Doslovnim tumačenjem dolazi se do toga da sada oni imaju i šira prava jer im se ona priznaju u dužem vremenskom periodu i to bezuslovno, od 17. aprila 1941. godine do 15. maja 1945. godine, za razliku od prava priznatih borcima NOR-a koji imaju ista prava kao i u izvornom tekstu Zakona o pravima boraca od 1989. godine (čl. 2, st. 1 Zakona o pravima boraca). To je očigledna diskriminacija kojom se vrši povreda Ustava. ZID Zakona o pravima boraca priznao je i izmenio i čl. 3 Zakona o pravima boraca, tako da je pored „Partizanske spomenice 1941.“ ustanovljena i „Ravnogorska spomenica 1941.“. Tako je zakonodavac izrekom naglasio i da se „nosioci (Ravnogorske spomenice – prim. aut.) u pogledu prava utvrđenih ovim zakonom izjednačavaju sa nosiocima „Partizanske spomenice 1941.“ (čl. 3, st. 2 Zakona o pravima boraca). Opet je uređenje Ravnogorske spomenice prepušteno Vladi Republike Srbije, čime zakonodavac opet predviđa neravnopravan tretman za dve kategorije lica (boraca), koje bar nominalno tretira kao ravnopravne. One to, međutim, iz ugla istorije nikako nisu.

Izbor graničnih datuma oslikava način na koji zakonodavac tumači istoriju Drugog svetskog rata u Jugoslaviji. Naime, iako je početna hronološka odrednica, 17. april 1941, dan kapitulacije vojske Kraljevine Jugoslavije, razumljiva polazišna tačka kada se određuje ko se borio protiv okupacije, završna hronološka odrednica je problematična iz više razloga. Naime, ona ili podrazumeva da su do 15. maja 1945. pripadnici Jugoslovenske vojske u otadžbini – JUVU i Ravnogorskog

pokreta bili suprotstavljeni okupaciji ili iskazuje nebrigu zakonodavca u vezi sa konfrontacijom određenog naoružanog pokreta sa okupatorom. Čak i kada bi se održala klimava teza o antiokupatorskoj prirodi JVUO, uprkos napadu na partizane već 31. oktobra 1941. (Bešlin 2013, 87), i kada bi se ignorisali ratni zločini počinjeni na prostoru čitave Jugoslavije i Mihailovićeve dozvole svojim podređenima da se legalizuju, ne bi li ih mogao koristiti aparat Nedićeve vlade¹⁶, nemoguće je govoriti o JVUO kao o antiokupatorskom pokretu, nakon ogлуšenja Dragoljuba Mihailovića na poziv kralja Petra Drugog od 12. septembra 1944. da se pod Brozovu komandu svrstaju svi Srbi, Hrvati i Slovenci (Dulić 2012, 634). Od tog trenutka Mihailović i preostali, njemu verni, četnici svojom neposlušnošću i delovanjem protivnim kraljevom naređenju sebe konačno odvajaju od izbegličke vlade. Oni, zapravo, nedvosmisleno postaju pobunjenici protiv kralja, Kraljevine Jugoslavije i Narodnooslobodilačke vojske Jugoslavije – NOVJ. Kralj Petar Drugi se u svom govoru odredio prema onima koji njegov poziv ne prihvate: „Svi oni koji se oslanjaju na neprijatelja protiv interesa svog vlastitog naroda i njegove budućnosti, i koji se ne bi odazvali ovom pozivu, neće uspeti da se oslobode izdajničkog žiga ni pred narodom ni pred istorijom.“¹⁷ I pre nego što se ogлуšivanjem na kraljevu naredbu Mihailović sam eliminišao iz, makar formalno, antiokupatorske strane, vredi napomenuti da se u nemačkoj komandi i pre računalo na saradnju sa Mihailovićem, koji bi sa Nedićevim trupama bio protivnik NOVJ. „Političku slogu Nedić-Draža Mihailović treba posmatrati kao činjenicu“, stoji u zabelešci Obaveštajnog odeljenja Komande jugoistoka od 18. avgusta 1944.¹⁸ Dakle, izbor 15. maja 1945, dana kada su prestale ratne operacije u Jugoslaviji, politički je i revizionistički čin koji relativizuje i čak nagrađuje kvislinštvo.

Diskriminacija postoji kada se sa licima koja su jednaka postupa nejednako, odnosno kada se sa nejednakim licima postupa jednako. Ako zakonodavac Ravnogorski pokret i Jugoslovensku vojsku u otadž-

¹⁶ Ovlašćenje Draže Mihailovića od 12. oktobra 1942. kapetanu Đuru Ivetiću za legalizaciju odreda kod okupatorskih vlasti (videti Bešlin 2013, 131–132).

¹⁷ Govor kralja Jugoslavije Petra II Karađorđevića u londonskoj emisiji BBC (Bi-bi-si) na srpskohrvatskom jeziku 12. septembra 1944. sa pozivom na ujedinjenje Srba, Hrvata i Slovenaca pod rukovodstvom komandanta Narodnooslobodilačke vojske Jugoslavije maršala Tita (videti Bešlin 2013, 140–141).

¹⁸ Zabeleška Obaveštajnog odeljenja Komande jugoistoka od 18. avgusta 1944. sa sastanka održanog 17. i 18. avgusta u Komandi jugoistoka povodom ponude Draže Mihailovića za saradnju u borbi protiv jedinica NOVJ (videti Bešlin 2013, 137).

bini, sa jedne strane, i NOR, sa druge, tretira kao jednake, a predviđa povoljniji režim za prve, onda je diskriminacija očigledna, a ove odredbe su neustavne. Tako je u svojoj odluci odlučio i Ustavni sud, našavši da je povređen čl. 21. Ustava Republike Srbije o zabrani diskriminacije.¹⁹ Međutim, Ustavni sud je odlučio da je ustanovljenje „Ravnogorske spomenice 1941.“ zakonodavac doneo u skladu sa svojim ustavnim ovlašćenjima, što se kosi sa istorijskim činjenicama i nalazima istorijske nauke. U pomenutoj odluci Ustavni sud je našao i da je neustavna odredba čl. 15 ZID Zakona o pravima boraca, kojom je izmenjen član 35. Iz ugla istorijskog revizionizma i zloupotrebe prava u političke svrhe, ovo je verovatno odredba u kojoj je ideologija „anti-antifašizma“ (Kuljić 2006) bila najizraženija. Izvorna verzija zakona od 1989. predviđala je u čl. 35, st. 1 da „prava predviđena ovim zakonom nemaju borci NOR-a osuđeni pravosnažnom sudskom presudom zbog učestvovanja na strani okupatora ili njegovih pomagača, protiv partizanskih odreda narodnooslobodilačke vojske i partizanskih odreda Jugoslavije, Jugoslovenske armije ili saveznika Jugoslavije“, ali je ZID Zakona o pravima boraca izvršio izmenu tako da se sva prava predviđena ovim Zakonom odnose na sve pripadnike NOR-a, bez obzira na to da li su osuđivani pravosnažnim sudskim presudama da su učestvovali u borbama protiv partizanskih odreda narodnooslobodilačke vojske i Jugoslovenske armije (čl. 15 ZID Zakona o pravima boraca). Pravno obrazloženje ovakvog postupanja, po našem mišljenju, nije moguće ovde ponuditi. Jedini razlog možemo videti u pokušaju demonizacije jugoslovenskog nasleđa, pa čak i u delegitimizaciji i delegalizaciji pravosnažnih sudskih odluka, što je potpuno suprotno principima vladavine prava. I ne samo to, nego je ovakva odredba otvorila mogućnost da boračka prava ostvare osuđeni saradnici okupatora. Zato je Ustavni sud u istoj odluci oglosio i ovaj član neustavnim, pa je i on prestao da važi.²⁰

Ostali su, međutim, značajni problemi. Iako sada u suženom obimu, ipak su priznata prava pripadnicima Ravnogorskog pokreta i JVUO. Jasno je i da je zakonodavac do kraja ideološki neopredeljen, ne praveći razliku između ovih pojmova, često ih i mešajući.

Na osnovu ovlašćenja iz Zakona, Vlada Republike Srbije donela je Uredbu o načinu ostvarivanja prava pripadnika Jugoslovenske vojske u otadžbini i Ravnogorskog pokreta u oblasti boračko-invalidske

¹⁹ Ustavni sud, *Službeni glasnik RS* 69/2012, para. 17 (obrazloženja)

²⁰ Ustavni sud, *Službeni glasnik RS* 69/2012, para. 21 (obrazloženja)

zaštite²¹ (dalje: Uredba). Povodom nje, odlučivao je Ustavni sud i na osnovu odluke je veliki broj odredaba prestao da važi.²² Uredba je pratila zakon pa je ponovo pripadnicima JVUO i Ravnogorskog pokreta priznala prava u većem obimu.

Ako sada napustimo jezičko tumačenje, jer dovodi do apsurdne situacije, primenom istorijskog, dobili bismo sličan ishod. U ovom Zakonu nije bilo mesta za vršenje izmena u onom smislu u kome je to učinio zakonodavac od 2004. godine. Jedino rešenje kojem je mogao da pribegne bilo je donošenje novog zakona. Okolnosti donošenja zakona 1989. godine govore nam u prilog činjenici da je bilo neophodno urediti u jednom zakonu oblast boračke zaštite, tako da bude u saglasnosti sa saveznim propisom, a i iz nomotehničkih razloga. Svakako je, kao što smo pomenuli, donošenje Zakona proteklo u atmosferi izraženog antifašizma, koji je isključivao i četnike. Pošto je savezni Zakon donet 1981, a potom 1998. godine, on nije prestao da važi ni nakon nestanka savezne države. Primenom sistematskog tumačenja (Zander 2004, 130–131), dolazimo do zaključka da su izmene od 2004. godine u Zakonu o pravima boraca, dovele do nesaglasnosti ovog zakona sa ranijim saveznim, a sada i dalje važećim republičkim Zakonom o osnovnim pravima boraca. Time je nastao potpuni haos u ovoj oblasti. Zato je Narodnoj skupštini Republike Srbije i upućen Nacrt Zakona o pravima boraca 2019. godine, koji je u februaru 2020. godine i usvojen. Ali, on sada proces istorijskog revizionizma sprovodi do kraja. Navodni cilj bilo je uređenje pitanja boračkih prava za učesnike u ratovima devedesetih i sređivanje „haosa“ u ovoj oblasti, ali njime se zapravo nastavlja ranija praksa donošenja i nametanja istorijskih odluka. Tako, čl. 5 uređuje krug lica koji imaju status borca i njime su potpuno izjednačena prava pripadnika partizanskih i četničkih odreda. Čl. 5, st. 1, tač. 4 određuje da se borcem smatra i pripadnik JVUO, odnosno pripadnik Ravnogorskog pokreta koji je učestvovao u antifašističkoj borbi u Drugom svetskom ratu, počev od 17. aprila 1941. godine do 15. maja 1945. godine. Iako vrlo verovatno sudska praksa neće imati previše „posla“ oko ovih odredaba, ipak bi bilo zanimljivo razmotriti moguća tumačenja. Naime, ako zakonodavac kaže da se status borca priznaje samo onim pripadnicima JVUO, odnosno Ravnogorskog

²¹ Uredba o načinu ostvarivanja prava pripadnika Jugoslovenske vojske u otadžbini i Ravnogorskog pokreta u oblasti boračko-invalidske zaštite, *Službeni glasnik RS* 51/2005, Odluka US 103/2012

²² Ustavni sud, *Službeni glasnik RS* 103/2012

pokreta, koji su učestvovali u „antifašističkoj borbi“, ima li onda prostora da sud oceni da oni ipak neće uživati prava zajemčena zakonom jer nisu učestvovali u borbi koja je bila antifašistička (u nekom budućem, hipotetičkom slučaju, za priznanje prava); za njih je ona bila antipartizanska i kolaboracionistička, kao što smo ranije pokazali. U periodu od 13. maja do 3. juna je održana i javna rasprava, a jedan od argumenata je bio taj da ovim Zakonom uopšte ne treba navoditi ove kategorije lica, s obzirom na to da ih ima vrlo malo. Iako je ovaj argument delimično tačan, vrlo je važno razmotriti potrebu zakonodavca za donošenjem i proglašavanjem „istorijskih istina“.

5. ZAKLJUČAK

Jedno od pitanja o kojem se dosta raspravljalo u teoriji prava jeste da li sudovi odluke donose prostim zaključivanjem u silogističkom obliku ili na mnogo složeniji način. Drugačije postavljeno, ovo pitanje bi moglo da glasi i kolika je sloboda sudija u odlučivanju. Naime, sud jeste vezan važećim propisima, on ih mora primeniti. Stoga, pitanje da li je sudija donošenjem određene odluke pokazao da se saglašava sa tim pravilom različito je od pitanja kako je izgledao misaoni proces kroz koji je prolazio (videti Hart 2013, 198). Sudije se načelno drže propisa. Međutim, oni se pravilima koja čine sudske odluke konačnim i autoritativnim mogu udružiti u odbacivanju postojećih pravila (Hart 2013, 204). U slučaju propisa koje smo pomenuli ipak se može uočiti da se i sudovi saglašavaju sa njima. Ali, na ovom mestu, primenjujući strogo normativni metod, taj postupak i ne možemo do kraja označiti kao „ideološki“. Pošto tvrdimo, na osnovu dvostruke: pravne i istorijske analize, da je pomenutim zakonima izvršena zloupotreba prava radi nametanja političkih interesa koji su u suprotnosti sa jasno dokazanom (i proverljivom) istorijskom istinom, onda je i logično pitanje da li je sudija „saučesnik“ ili se njegova dužnost sastoji upravo u primeni propisa onakvih kakvih jesu? Poslužićemo se ovde argumentom Alfa Rosa (Alf Ross). On tvrdi da ne bi bilo moguće izgraditi pravni poredak koji bi funkcionisao, ukoliko unutar sudstva ne bi postojalo živo i bezinteresno osećanje poštovanja i pokornosti prema tradicionalnoj pravnoj ideologiji (Dajović 2008, 91). Kako Dajović zaključuje, izvesna norma se može smatrati „autorizovanom“, između ostalog, i zato što ju je stvorio organ koji poseduje formalno opravdanje (autorizaciju) za stvaranje

takve norme (2008, 135).²³ Sa ovim se možemo složiti, razumevajući pravnu sigurnost i stabilnost pravnog poretka kao važna pravila. Ipak, ako je zakonodavac svoj položaj zloupotrebio do te mere da je zakone podvrgnuo sopstvenim interesima, onda se takvim zakonima mora odreći važenje. Ako on zloupotrebljava od građana datu nadležnost, da „za njih“ i „u njihovo ime“ donosi zakone nametanjem sopstvene interpretacije prošlosti, onda niko nije dužan da takve stavove prihvati, utoliko pre što su te interpretacije netačne. Do takve tvrdnje se došlo primenom metoda istorijske nauke, a to znači da su takve tvrdnje proverljive, upravo zato što su naučne.

Da zaključimo: primena propisa koje je doneo izabrani zakonodavac, od strane sudija, ključna je za stabilnost pravnog poretka. Ali, ako je očigledno da je tim propisima zakonodavac zloupotrebio²⁴ svoju nadležnost (nepoštovanjem nalaza istorijske nauke i nametanjem sopstvenih, netačnih istorijskih konstrukcija), onda postoji dužnost, bar institucionalne borbe za prestanak važenja takvih propisa.

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²³ Na istom mestu videti primer „dobronamerno i zlonamernog pravnog savetnika“ i „štićenika“.

²⁴ Iako bi to bilo vrlo ekstenzivno razumevanje kategorije zloupotrebe nadležnosti, pod tim podrazumevamo jednu vrstu te zloupotrebe, a to je, kako je Lukić označava zloupotrebi vlasti (Lukić 1995/2019, 209)

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REVISION OF HISTORY IN THE LEGISLATURE AND THE JUDICIARY: THE CASE OF THE RAVNA GORA MOVEMENT

Summary

The year 2000 was an ideological turning point in Serbia, which was followed by the enactment of several laws with a clear ideological message. The legitimization of the četnik movement was conducted on the political level through the judicial branch of power, which gave this legitimization a legal form and foundation. In other words, the power was abused to push political decisions. In this paper, we will analyse the way in which the 1989 Law of Rights of the Fighters, War Veterans and Their Families was changed by a lawmaker which had a different ideological background. Namely, almost nonsensical changes and additions to the Law were added in 2004. They introduced a new solution, which was certainly not the intention of the 1989 lawmaker, by recognising the right to a pension to the members of the četnik movement. We ask: Should the Law, that was changed so much that it altered the intention of the original lawmaker, be in power? And, more importantly, is the judge able to follow through with this change and make a just decision?

Key words: *revisionism, Law of Rights of the Fighters, Chetnik Detachments of the Yugoslav Army, abuse of power, Dragoljub Mihailovic.*

Víctor García Yzaguirre*

JUDGES AND EXCEPTIONS: DEFEASIBILITY OF NORMS BY JUDICIAL ACT**

The purpose of the paper is to show that the introduction of exceptions in rules by judges is a manifestation of creative role of courts of law that can be explained as an act of defeating norms. In order to achieve this objective, I will carry out the following steps: i) I will formulate a distinction of normal and abnormal cases in order to indicate what type of cases the judges consider it justified to except a rule; and ii) I will present two types of analysis of the operations carried out by the judges to justify the defeat of a rule, the first one based on the idea of loss of applicability by the creation of a hierarchy between norms, and the second one based on the idea of modification of the scope of the norm.

Keywords: *Applicability, exceptions, normative inconsistency, recalcitrant experiences, scope and force of norms.*

1. INTRODUCTION

The purpose of this paper is present to ways of analyzing how judges, through their jurisdictional decisions, can create exceptions to rules, whether these rules are identified from a law created by a parliament or contained in a precedent. In order to achieve this objective, I will proceed with the following steps: I will start by distinguishing between normal and abnormal cases in order to differentiate situations in which judges qualify cases where they should introduce an exception to a rule. After that I will present two types of alternative analysis on how to create an exception that have been offer by the studies in defeasibility of norms: i) as a result of a conflict between two norms; or ii) as a result of a conflict between a norm and its justification.

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In this regard, I must clarify that my analysis will solely focus on conditional prescriptive norms. In this sense, my analysis pretend only to be a possible way of explaining how judges create exceptions to rules composed of an antecedent and a normative consequence that contains a deontic qualified action or state of affairs.

2. THE DISTINCTION BETWEEN NORMAL CASES AND ABNORMAL CASES

Usually when we understand the composition of a rule by the structure “if p then q”, we are not stating that verification of p is a sufficient condition of q, but what is being said is that “if p normally then q” (Navarro, Rodríguez 2014, 94). This means that we have two types of cases: i) normal cases in which it is not a problem to assume that p verification leads to q; and ii) abnormal cases in which p verification does not guarantee q. With this distinction between normality and abnormality we could clarify in which cases the law applicators carry out operations to exempt norms. In this sense, abnormality refers to all those cases that judges consider could create an exception.¹

The term “normality” is ambiguous², so it is necessary to specify the meaning that interests us here. It seems relevant to me in this type

¹ I must point out that when facing a case of abnormality, judges could have at least two attitudes: either assuming that they must exempt the norm; or assuming that they have the faculty (understood as the permission to do and not to do) to create an exception to the norm, that is, that they are allowed to do so or not. I am only interested in clarifying the case in which the applicator of the law decides to except the rule, whether by assuming a prescription or a faculty.

² Among the many possible meanings that we can attribute to “normality” I have identified the following (this is not a closed list, it serves only to exemplify the problem of ambiguity):

- 1 Understood as an unjustified expectation, that is, as cases in which it is assumed that an event will occur, even though we have no guarantee that it will happen (for example, we see fish eggs and assume that there will be fish, without knowing the statistical success rate of how many fish are likely to be born in the circumstances in which those eggs are found).
- 2 Understood as a regularity, that is to say, as a generalization based on having information about a certain frequency of a certain event occurring after certain circumstances.
- 3 Understood as an unquestioned assertion. This in a prescriptive and descriptive sense. Prescriptive because it is an affirmation that, within public space, it is not admitted to doubt (for example, in some societies it is not allow to question in public debate the statement “it is wrong to

of discussion to consider a “normative normality” as a complex notion. Normality and abnormality are preached from the possible results that would be generated by the application of a rule, in other words, it refers to whether the judge is willing to order the execution of a certain consequence to a certain subject in a certain context.

This normative normality involves two types of alternative considerations: a systematic normality and evaluative normality. Systematic normality refers to the cases in which applying a rule does not contradict any other rule applicable to the same case. This is an analysis considering only the relation of the norm with other applicable norms. In this sense, normality refers to all those cases in which the normative system offers a univocal answer, in more precise manner: cases of systematic consistency.

The evaluative normality refers to cases in which the prescription contained in a norm is also covered by the justification of the same norm or by another principle also applicable to the case. This is an analysis of the impact of the application of the norm considering two aspects: either the relationship of the norm with its justification or the relationship of the norm with other evaluative considerations regarding how an action or state of affairs should be regulated.

The normative abnormality relates to the scenarios in which, if the norm were applied, it would generate unacceptable consequences.

devour newborn children”). Descriptive as it is an affirmation that has not so far been controversial in public spaces.

- 4 Understood as a desired state. As a reference to how certain future events should be (according to some criteria of axiological correction).
- 5 Understood as a regulative model. It refers to the type of habitual supposition that is used to design normative frameworks. For example, this sense is used by the critical legal studies that sustains that the law in a certain country has been approved assuming that the regulated agents are male, between 20 and 50 years old, heterosexual, without any type of disability, white, catholic, economically autonomous, among others.
- 6 Understood as a standard of knowledge. It refers to those criteria that are used to evaluate the type of information that a person should possess, according to the factual circumstances in which they usually find themselves (for example, the reasonable consumer standard used in consumer protection).
- 7 Understood as a reference to the absence of change. It refers to those cases in which we want to realize that the contextual (relevant) elements have not changed (for example, the use of the clause *ceteris paribus*).
- 8 Understood as social moral. It refers to all of them criteria that are used as criteria of social moral correction.

Unacceptable in two senses: caused by identifying a normative inconsistency (systematic abnormality) or by lack of justification of the prescription contained in the norm (evaluative abnormality).³

According to the first option, there is an unacceptable consequence if the judge considers that the normative system prescribes the application of rules that are incompatible with each other. The judge, in order to recover normality (systematic consistency), must prefer one rule over the other. This implies the creation of a criterion of preference which implies the non-application of an applicable rule, in other words, defeat (or exempt) its application.

According to the second option, on the other hand, there is an unacceptable consequence if the prescription contained in a norm is outside the scope of the reasons justifying the norm. If the judge considers that the reasons justifying the rules are normatively relevant, then he will not apply the rule to all those cases that are covered by the justification. In other words, the non-correspondence between the prescription and its justification leads to the non-appliance of the prescription, that is to say, to defeat it or to exempt it. In the following lines I will specify each of these options.

It should be noted that normality does not imply immutability: the qualification of a case as normal or as abnormal depends on considerations on how we identify the norms and/or justifications applicable to the case. From this point, then, it is not possible to point out that the effects of applying a norm cannot be, at a later time, qualified as abnormal and, because of this, an exception could be created. Each moment represents an opportunity to make new judgments regarding the normality or abnormality of a case.

³ It may be the case that our information on the events of the individual case also varies, which has as a consequence that norms considered up to the present moment irrelevant become relevant (and, at the same time, norms that were considered relevant, we now realize that they are irrelevant to the case). These are the cases where a better understanding of the (relevant) facts of the individual case allows us to identify which is the applicable standard. Let's look at the following example: one person hires another to transport goods on an agreed date. The date arrives and the goods have not arrived, so the case is applicable to the regulation on contract breaching. Sometime later we received information that the carrier endured a tsunami that destroyed his transports and, therefore, the goods. This rules out (according to the regulation of the country), the applicability of the rules of contract breaching. As we can see, this epistemic aspect is only relevant to determine which is the relevant norm or norms. Presented this way, the epistemic problem (what happened) precedes the normative problem (solving an inconsistency between norms) and the discussion on the creation of exceptions is normative, not epistemic.

2.1. Abnormality as a conflict between rules

Cases of systematic abnormality refer to cases in which judges have identified an inconsistency in the normative system. By inconsistency I mean the logical impossibility of compliance generated by at least two applicable rules that regulate the same generic case, but with different and incompatible normative consequences. To explain it in a more precise manner, we have a conflict every time we have a case of inconsistent deontic modalities in respect to two generic cases that are totally or partially identical (Ross 1963, 124; Bobbio 2002, 188; Gavazzi 1959, 52–55; Chiassoni 2011, 288; Navarro, Rodríguez 2014, 104).

In the context of judicial decision-making, cases of normative inconsistency are presented with rules that are applicable. The applicability of a rule refers to the duty imposed by a rule N1 to the law applicator (e.g., a judge) to use a rule N2 (whether or not belonging to the legal system), in the justification of his or her institutional decision to resolve a particular case (Rodríguez, Vicente 2009, 186; Navarro et al 2004, 337; Ferrer, Rodríguez 2011, 185; Pino 2010, 63).

As can be seen, under this way of understanding applicability, there is a relation between a norm that establishes a prescription to use another norm each time an individual case is verified that subsumes in its antecedent. This relationship implies, as Moreso and Navarro have differentiated, two notions related to each other: internal applicability and external applicability of general rules to particular cases.⁴

An N1 norm is internally applicable in a determined moment to a particular case whenever this is an instantiation or exemplification of the generic case contained in the antecedent of the norm. As can be seen, with this notion the relation between a norm and an individual case is described (case that subsumes in the scope of the general norm) (Von Wright 1970, 90). In more precise terms, internal applicability accounts for the scope of the norms, understanding this concept as the set of cases to which the norm has deductively resolved (Navarro 2005, 118).

An N1 norm is externally applicable in a specific moment to an individual case that is an example of the generic case C, provided that the following conditions are jointly satisfied: i) the generic case C is

⁴ This distinction was initially introduced by Moreso and Navarro (2005, 201–209). In what follows I will assume the reconstructions and critiques contained in Navarro (2005, 107), Rodríguez and Vicente (2009, 190) and in Navarro, Rodríguez (2014, 132).

foreseen in the antecedent of the N1 norm, that is, is internally applicable; and ii) another N2 norm, belonging to the legal system, orders the law applicator to use N1 in the justification of his decisions each time they are faced with an example of the generic case C (Navarro, Rodríguez 2014, 129; Navarro et al 2004, 345; Rodríguez, Vicente 2009, 191; Ferrer, Rodríguez 2011, 61).

The external applicability of norms, in this sense, is a descriptive notion of the force of a general norm, this is, the aptitude of norms to operate as normative premises in the justification of institutional decisions. To be more precise, it counts for the duty of a law applicator of the right to apply this general rule in the solution of the case (Navarro 2005, 108–109). With this concept we can describe a triadic relationship between an N2 norm with an N1 norm (imposes the duty to apply it) and an individual case that is an instantiation of a generic C case.⁵

It should be pointed out that the set of rules applicable is not equivalent to the set of rules belonging to a legal system. The duty of the law applicator to apply a rule does not imply that this rule must belong to the legal system (Orunesu, Rodríguez, Sucar 2001, 29; Navarro, Rodríguez 2014, 135; Rodríguez, Vicente 2009, 192), since he may have the duty to apply rules that are part of non-legal normative systems or rules that no longer belong to the legal system. In these cases, the judges have the duty to apply a rule that is part of another legal system, therefore, an extra-legal⁶ rule will be externally applicable.⁷

⁵ For the purpose of clear and direct exposure, I refer to specific standards, without prejudice to the fact that applicability may be predicated to classes of standards. To be more precise, external applicability can be used to describe both a triadic relationship composed of specific rules and an individual case, and a triadic relationship composed of classes of rules and a class of cases. This same precision must be considered for the relations between norms and cases clarified by internal applicability.

⁶ Navarro y Rodríguez explain this in following terms: «[u]nlike internal applicability of legal norms, the connection between the externally applicable norms and a certain case depends on *another* norm or set of norms containing a certain criterion of applicability. This is the reason why we said that the connection between externally applicable norms and cases is *extrinsic* or *institutional*» (Navarro, Rodríguez 2014, 135). See also: Ferrer, Rodríguez (2011, 181). In this sense, we have the following set of possibilities:

- i. Inapplicable rule, but belonging to the legal system;
- ii. Inapplicable rule that does not belong to the legal system;
- iii. Applicable rule belonging to the legal system; or
- iv. Applicable rule, but not part of the legal system.

⁷ As we can see, this framework also could be used to explain an inconsistency between a legal rule and a moral rule in case we assume that moral rules are normative relevant in the solution of legal cases.

For example, this is usually the case with regulations in each country in the Private International Law area. In these cases, the judge must use as normative premises of his judgement norms that belong to normative systems of other countries. This doesn't mean that these rules belong to the national normative systems nor that they should belong. Another example are the cases where the judge must use moral rules to solve a case. In these cases, morality is applying a correction criterion without meaning that morals are law.

The case we are interested in is the one where the judge has to rule on a case, but has two internally and externally applicable rules, each of which has different and contradictory⁸ normative consequences. In these cases, we must resolve the case by determining which of these two is the rule that the judge must apply to the case. In order to do this, we must create a preferential relation between the two rules.

A relation of preference between norms refers to the criteria by which one norm is privileged over another in case both are applicable to the same case. These criteria can be interpreted in two ways: (i) as preference criteria that affect the membership of a norm (these criteria are used to reject the entry of a new norm into the system because, if they were to enter, they would produce a situation of normative inconsistency); or (ii) as preference criteria that affect the (external) applicability of a norm (these criteria are used as directives addressed to the law applicator to determine which norm to apply in case of conflict and which not, without this implying that the norm not applied ceases to belong to the normative system). All preference criteria affect the external applicability of norms, the effect on membership depends on how each normative system has regulated this matter. In this sense I will sense I will focus on the effect that a preference criterion has on the force of norms.

⁸ This allows me to introduce additional precision. It is usually a subject of argument, the we distinguish a precedent "because of a fact", but this is imprecise or, at least, enthymematic. Facts are not by themselves normatively relevant, what we need is for a standard to qualify them as such. In this sense, each time we consider that a fact should not be regulated by the norm what we are doing is pointing out that a norm qualifies this state or action with a different and incompatible deontic modalizer, which is applicable to the case in a way that creates a normative conflict. In this sense, what we do when we make a distinguish is to account for a conflict between two rules: between the rule provided in the preceding and another rule (of the legal system itself or morality or any other, provided that it is externally applicable) and it happens that we consider that we must apply, for the case to be resolved, the solution provided in that other rule. The result of giving preference to that other rule is that the scope of application of the precedent or its assumption of fact has been shortened or delimited.

Among the rules that are part of the system of applicable norms, we can identify or create preference criteria. This means that the rules of that system are related in such a way that some rules take precedence over others. This type of relationship can be created in at least the following ways (Alchourrón, Bulygin 1991, 144; Ferrer, Rodríguez 2011, 150; Bobbio 2002, 342–351; Rodríguez 2002, 159):

- i Established by the legislator.⁹ This is the case where enunciations which prescribe preferential relationships between other enunciations which are also part of the legal system have been introduced into the legal system;
- ii Established by the applicator of the law using non-literalist interpretative directives. This is the case when the applicator introduces a new rule in order to create a hierarchical relationship between two rules that, until now, operated without being related to each other in this way. These criteria may be: by the date of promulgation of the provisions to which the hierarchical norms are attributed (*lex posterior*¹⁰); by the competence

⁹ This point may generate confusion as to how we understand legal interpretation. In effect, if we assume a skeptical conception the legislator introduces dispositions and not norms, so that it is not the legislator, finally, who constructs the criterion of preference, but the interpreter (with more precision: the law applicator). Otherwise, from a non-skeptical conception, it can be attributed to the legislator to have introduced a rule in the sense that he has introduced a linguistic enunciation to the merit of the meanings of the words used. In other words, a literal interpretation of the introduced provision is assumed, so that it results in a normative system conformed by norms identified as clear cases (in a semantic sense). On this point it is not opportune to go deeper at this moment, but for precision purposes (and to make a charitable reconstruction of the theses I am following) for the effects of this section, pointing out that the legislator has created this preference I do so in the sense that a literal interpretation of the provision created legislatively has been chosen.

¹⁰ The preference criteria allow a type of theoretical and practical analysis. Theoretical in the sense that they allow us to classify, according to the properties of the norms and how it relates to others, what kind of relationship it has. Also, practical in the sense that they allow us to determine which rule should be applied to the specific case (converts an inconsistent situation into a consistent one). In this sense, the *lex posterior* is a way of calling the relations between norms based on a chronological criterion. Understood as classification criterion, a relationship is identified between two norms by which one norm comes first and the other norm comes after the other, depending on its date of incorporation into the legal system. Understood as criterion of preference, in case a Previous standard and a Later standard establish incompatible solutions for a case to which both are applicable, then the Later standard is preferred.

The *lex superior* is a way of calling the relations between norms based on the hierarchy of their sources. Understood as a classification criterion, a relationship

possessed by the authorities that created the interpreted provision (*lex superior*); by the specialty relationship between the two norms (*lex specialis*); or preferences constructed on the basis of evaluative criteria (by legal construction).

Preferential relationships between rules allow us to resolve conflicts between them. Faced with two rules applicable to a case that prescribe legal consequences that are logically incompatible with each other, a third rule will be the one that determines which of these to choose to be applied to the specific case (Alchourrón, Bulygin 1991, 136). Likewise, it may be the case that we have a conflict between preference criteria (in other words, between conflict resolution criteria), that is to say, it may be the case that two norms that have established preference relations between norms come into conflict with each other.¹¹

Preference relations between norms can be presented in two ways: as unconditional preferences or as conditional preferences (Ferrer, Rodríguez 2011, 156). Unconditional preference relationships refer to the preference of one norm (or type of norm) over and above the other norm (or type of norm) to which it relates in any case of possible conflict. In other words, a relation of priority of a norm has been established over all the supposed cases in which they come into conflict with each other. An example of this idea is to consider that whenever the *lex superior* criterion conflicts with the *lex posterior* criterion, we should, in any case, prefer the *lex superior* criterion.

On the other hand, conditional preference relationships refer to the fact that the preference of one norm (or type of norm) exceeds the other norm (or type of norm) with which it relates in the case of a conflict being resolved, but facing new cases of conflict such preference may be reversed. An example of this idea is to consider a case of conflict between rights in which, in light of the facts of the dispute, in some cases one right will be preferred over another, but in the face of different factual premises it will be resolved in an inverse manner.

is identified between two norms by which one is Superior and the other is Lower one of the other, according to the competence of each authority that created the provision from which the norm was formulated. Understood as preference criterion, in case a Superior standard and an Inferior standard establish incompatible solutions for a case to which both are applicable, then the Superior standard is preferred.

¹¹ For a very precise and detailed analysis of this point see Guatinoni (2001, 547–558).

In favor of clarity, let's look at an example. We have a case in which a person wants to donate an organ, but is a minor. In this respect, we have two relevant rules:

N1: if discernment (d), then permitted to donate organs (Po)

N2: if minor (m), then prohibited to donate organs (Pho)

Within this microsystem of applicable rules to the case we would have a normative conflict each time the person has discernment and is a minor, because in such cases the action of donating¹² will be permitted and prohibited at the same time. As indicated, in order to resolve this conflict, the law applicator may create a preferential relationship between both norms that may be unconditional or conditional.

If an unconditional preference is built, then each time we have conflict between N1 and N2 it will be resolved so that one rule will prevail over the other. Let us assume, for the purposes of the example, that an unconditional preference of N2 over N1 is constructed, so that each time the properties d and m concur, the normative consequence of the N2 norm (prohibited to donate) will be applied. Under this assumption, the derivative norm (d.m-> Po) has lost its applicability (force).

If a conditional preference is constructed, then we will prefer one rule over the other whenever certain facts are verified, but this preference can be reversed before the occurrence of other facts. To continue with the example, let us consider that it is a minor, with discernment, who wants to donate an organ to his son (property h). Let us think that, for the applicator of the law, in this type of cases, the norm N1 (permissive) must prevail over the norm N2 (prohibitive). In this sense, a relationship of preference is created for permission over prohibition in cases of organ donation by minors, as long as the donation is for the benefit of the donor's child.

¹² We can verify this with the following matrix (Table 1):

Table 1: Matrix of applicable rules in cases of normative conflict

		N1 d->Po	N2 m->Php
d	m	Po	Pho
d	¬m	Po	
¬d	m		Pho
¬d	¬m		

Under this scenario, the derivative norm (d.m.h-> Po) has lost its applicability (force). It could be the case that N1 and N2 may have inverse preference relationships, for example, in the case that the donor is not the beneficiary's mother, or if the donor is 17 years and 11 months old. As noticed, when we are considering the property *h* what we are doing is blocking the applicability of certain norms derived from N1. This operation, as we see, does not generate a conceptual distinction between unconditional and conditional preferences, since in both the operation and the result is the same, it only differentiates the specification of the conditions that activate the preference relationship. In this sense, between an unconditional and a conditional preference there is a gradual difference.

What is previously explained is a way of presenting the hierarchy, but, as it may have noticed, by considering property *h* relevant we can understand that we are modifying the set of relevant properties foreseen in the antecedent of the norms. This operation, as we see, does not generate a conceptual distinction of the unconditional preferences with the conditional ones, but between both there is a gradual difference.¹³

As we can see, when judges defeat a rule or, in other words, when they create an exception to a rule (in cases of systematic abnormality) what they do is introduce a preference criterion (unconditional or conditional) between two conflicting rules. In this sense, any judge can create exceptions, since by doing so they only affect the applicability of a rule.

2.2. Abnormality as a conflict between prescription and its justification

An alternative to the previous proposal is to consider the justifications of the rules as normatively relevant in order to determine their applicability. Judges create exceptions each time prescriptions regulate cases that cannot be subsumed in the justification of the rule. But this approach has different theoretical presuppositions that will be now clarified.

¹³ As Navarro y Rodríguez point out, Robert Alexy's weight dimension is a metaphorical way of accounting for the construction of conditioned preference criteria that, in addition, would allow the idea of weighting in the light of the circumstances of the case to be reconciled with the pretension of an argumentative university (Navarro, Rodríguez 2014, 158).

I will start by specifying that I will use the theoretical instruments proposed by Frederick Schauer to address this point. For this author norms are understood as a generalization constructed from a purpose or justification (Schauer 2004, 76). In this way, the selection of properties (understood as identifiers of states of things or actions) with which we construct an antecedent of the norm is determined by this justification (in other words, a rule would be a specification of a justification).

This model norm is composed of two levels: a) a prescriptive level or generalization of a justification that possesses a prescription (a conditional norm that contains an order or prohibition to take an action); and b) a justifying level or of reasons that are behind the rules (justification or purpose of the rules, hereinafter underlying reasons). When analyzing whether a rule is applicable to an individual case, one of the following scenarios may occur:

1. The individual case is within the linguistic uses of the terms used at the prescriptive level and within the scope of application of the underlying reasons.
2. The individual case is within the linguistic uses of the terms used at the prescriptive level and outside the scope of the underlying reasons.
3. The individual case is not within the linguistic uses of the terms used at the prescriptive level, but within the scope of the underlying reasons.
4. The individual case is outside the linguistic uses of the terms used at the prescriptive level and outside the scope of the underlying reasons.

The first and fourth cases are not problematic, as they are situations of application and non-application respectively. We are concerned with the second and third cases, those in which the antecedent constitutes an inadequate specification of the justifying level. These are recalcitrant experiences (Schauer 2004, 98) or cases in which we have reasons based on the underlying reasons of the rule to vary the verdict that would be obtained by applying the prescriptive level. These are classified as over-inclusive and under-inclusive.

Over-inclusive recalcitrant experiences are those in which the individual case is subsumable at the prescriptive level, but is not covered by the scope of application of the justifying level. In these cases,

the antecedent should have included more qualities or assets in order to exclude the individual case with the consequence.

Under-inclusive recalcitrant experiences are those in which the individual case is not subsumable at the prescriptive level, but is covered by the scope of application of the justifying level. In these cases, the antecedent must be expanded to cover all the cases for which the prescriptive dimension was formulated (this is achieve eliminating one property contain in the antecedent).

I think we can stablish a conceptual connection with the over-inclusive recalcitrant experiences and defeasibility or the creation of exceptions. Let us clarify a few points:

A case of over-inclusive experience only brings us to ask ourselves about how to solve a conflict between the solution foreseen by the prescriptive level and the solution that we can derive from the justifying level. One possibility is to assume the suboptimal result, that is, to resolve the individual case in spite of the fact that the verdict is not entirely correct based on some criterion of extra systemic correction. The other option is to create an exception to the norm or to defeat it. Defeasibility, in this way, alludes to the fact that in any case of recalcitrant over-inclusive experience, priority must be given in favor of the solution derived from the underlying (Rodríguez 2002, 95) reasons.

There is a difference between this way of understanding the creation of exceptions and the previous one (creation of a hierarchy by stablishing a preference criteria). When we resolve an over-inclusive recalcitrant experience by applying the justification over the prescription, it means that we have to reconsidered how we have made the generalization that ended in a norm. To be more precise, we have to reconsider the content of the antecedent of the norm, in the sense we must include a new property in order to exclude some cases of the scope of the rule. As we can see, this not a problem of external applicability, but of internal applicability.

By this approach, we can create an exception to a rule when its application there are good reasons for not applying the rule. Good reasons are all those with a force greater than would have been sufficient to determine the result in the absence of the rule (Schauer 2004, 238).

The idea of “good reasons” starts from the premise that not every contradiction between prescriptive and justifiable levels should imply that the former should yield. This is for two reasons: i) if so, it

would not have any purpose to have a prescriptive level, since all cases would be resolved by directly analyzing the justifying level; and ii) the prescriptive level incorporates predictability, certainty, uniformity and distribution of power (for our purposes we will call this “legal certainty” (Schauer 1998, 237)), elements that should not be dismissed, unless there is a reason to do so. In this sense, a good reason is one that has enough weight to indicate why we should regulate conduct in a certain way and this reason should be more valuable than legal certainty. Following these theses, we can create an exception to a rule (defeat it) as long as the operator considers that there are good reasons, in cases of over-inclusive experienter, for not applying them.

Consequently, exceptions can be created in those cases in which the application of rules depends on the occurrence of a fact that: i) is subsumable within a linguistic use of a term contained in the prescriptive level; ii) is not within the scope of application of the justifying dimension, or is a recalcitrant experience over-inclusive; and iii) the weight of the reasons in favor of the underlying reasons is greater than the legal certainty possessed by the prescriptive level of the rule.

It should be noted that not every non-application to merit of the underlying reasons is the same. At this point Schauer distinguishes between two phenomena (Schauer 2004, 179): i) situations in which the rule does not apply because the prescriptive level does not adequately specify the justifiable level (lack of application generated by reasons linked to the justifiable level of the rule itself)¹⁴; and ii) situations in which the norm does not apply due to underlying reasons specific to other norms.¹⁵ In this second scenario, we are in the case of contradiction at the justifiable level, in which the underlying reasons of one rule are in contradiction with those of another.

As we can see, standards can be approached in different ways depending on the relevance we give them to the effects of their application. The creation of exceptions, in this sense, depends on the way in which the decision-making processes (Rodríguez 2002, 95) are carried out. In other words, it depends on what we are willing to sacrifice. The law applicators, following Schauer, apply one of these models (Schauer

¹⁴ The result would be a reformulation of the rule resulting in a more precise or more correct specification (from the point of view of the interpreter) of the prescriptive level with respect to the justifiable level.

¹⁵ The result would be a reformulation of the rule with the result that some fragments of the antecedent exclude scenarios of application of the rule based on underlying reasons different from the underlying reason of the rule.

1998, 236–237): i) formalist model, based on an applicator that only seems relevant to check whether the individual case is subsumable or not in the general case; or a ii) adaptability model, based on an applicator that seems relevant to consider whether an unforeseen event and certain effects (because it gives a result that it considers wrong because it is insufficient to capture changes in human experience), which affects the application or not of a rule.

This idea is additionally linked to a normative claim as to how the applicators of the law should be. But it is important to emphasize that under this form of resolving cases the sacrifice of eliminating recalcitrant experiences is in that we cannot sustain that the rules continue being rules. If a rule applies only when the prescriptive level is consistent with the justifiable level, then the normative force of the former is dissolved in the latter (Schauer 1998, 237).

The law applicator will have to choose between two models of application of norms that translates into: i) consider that the judge can't create exceptions in spite of an over-inclusive recalcitrant experience, which leads to suffer from all the suboptimal cases; or ii) consider that the judge can create exceptions in cases of over-inclusive recalcitrant experience, which leads to the prescriptions not being determinant for the solution of individual cases.

This moves the discussion towards debates about what kind of law-applicator we should have. For Schauer, the discussion is often divided into two sets of arguments that can be summarized as follows (Schauer 2004, 86):

1. We have to prefer decisions taken by legislators¹⁶ over the discretions of the law applicators, because there are reasons to distrust them (corruption, technical incompetence, lack of time for decision making, precariousness of available resources, among others). Faced with this, we must have a formal model.

¹⁶ It should be pointed out that here we are referring to the standard formulated by interpreters applying hermeneutic codes based on a literal interpretation. As we can see, this set of arguments are committed to a certain degree of stability which entails (normative thesis) that we have to suffer from suboptimal results (in other words, there is a requirement to guarantee legal security as we have understood it in this document). Within this notion there is a set of normative theses regarding how the State should be employed, including some theses on the functions of judges, within which it would be to defeat norms (Schauer 2004, 86–87).

2. We must have the means to avoid and prevent the application of suboptimal verdicts to those affected by them, since this would imply assuming that the absurd (what is foolish, unjust, inefficient or any other term we use to refer to something that should not happen by virtue of a criterion of extra juridical correction) is legally obligatory.

On this point, I believe, the problem remains about preferences for decision-making models, but not conceptual. What does it mean to consider that the justifications of the norms are not normatively relevant? I am going to characterize the judges who dismiss justifications as formalist judges who jointly assume these four theses: i) the rules are prescriptions independent of the reasons for which they were created; ii) the law must be applied by subsumption; iii) the practical effects of the decisions are irrelevant; and iv) the law applicators elaborate general rules that must be followed by themselves and hierarchically inferior (precedents) law applicators.

Theses (i) and (iii) are related. As indicated at the beginning of this subsection, prescriptions are not conceptually independent of their underlying reasons; these are specifications of justification. In this case, the rules are complex structures in which, on the basis of a decision-making model, the law applicators decide to ignore the underlying reasons of the rule itself or underlying reasons derived from other rules that would justify departing from the verdict. Thesis (iii) is an answer to the question of what to do in case of recalcitrant experiences (there its link with thesis (i) regarding how to deal with the justifying level). It is a shortcut to appeal to the fact that they are willing to sacrifice it when deciding individual cases and the type of judges one wishes to have: one is thinking of a judge who cannot avoid applying the law, no matter how absurd or suboptimal the consequence.

In regard to thesis (ii), on subsuntive application of law, it should be noted that the creation of exceptions does not change the idea of subsuntive application of rules. However, this does mean that we have to weigh up whether there are good reasons (the weight of the reasons for not applying the rule outweighs the reasons for regulating conduct in the manner envisaged at the prescriptive level and legal certainty). Consequently, in order for judges to create an exception to a norm, they have to commit themselves to an adaptive model of decision making, which implies assuming that they have to make decisions that affect the set of properties with which we compose the antecedent

(introducing new properties in order to reduce the scope of application of the norm in such a way that the suboptimal is excluded).

As for thesis iv), to create general rules for other law operators, this is linked to the legal certainty of the new antecedent constructed to avoid suboptimal results. Once the rule has been exempted, this translates into the recognition of an undesirable situation of application of the rule, so each time this scenario is replicated, it should be avoided.

As discussed in this sub-section, when judges create exceptions using the justification of standards they are doing the following: i) they are adopting a decision-making model in which justifications for prescriptions are considered normatively relevant; and ii) they have considered the case to be an over-inclusive recalcitrant experience in which there are good reasons to reduce the scope of the norm.

3. CONCLUSIONS

I have outlined two possible ways to reconstruct how the judges create exceptions. Both are alternatives to each other and we will choose one or the other depending on what we are interested in clarifying. Under the first proposal, to except as a result of building a hierarchy between norms we explain a loss of external applicability, that is, the norm maintains its composition, but it is considered that there are other norms with greater weight that must be used in the justification of the decision. On the other hand, under the second form, to except is a result of varying the content of the rule, that is, of a modification of the rule. This implies assuming, at least, that the justifying level of the norms is normatively relevant and a determined model of decision-making.

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JUDICIAL AGENCY AND LEGAL MEANS IN JUDICIALIZATION OF POLITICS

Law's autonomy from politics has been in decline. Theories have been formulated to provide explanations for the development. However, these debates have overlooked the role of judicial agency in the construction of the Court's own fate. Judicial agency has a lot to determine when courts embark on their mission of embracing political circumstances surrounding them. The present paper argues that insistence on neutral principles by Legal Process School can be guiding for courts to devise judicial techniques that enable warranted appearance of neutrality. Two cases decided by the Israeli Supreme Court will be discussed to elaborate on the argument defended in the paper. In these cases, the Israeli Supreme Court constructs its institutional security by engaging in a principled line of reasoning across its evolving jurisprudence on the same political issue, namely by first exhausting more solid legal arguments and imposing conclusive constitutional resolutions once these less controversial decisions are implemented.

Key words: *Autonomy of Law, Israeli Supreme Court, judicialization of politics, judicial agency, Legal Process School.*

1. INTRODUCTION

Law's autonomy from politics has certainly been in decline. That law can be an adaptable instrument for the pursuit of political goals, is not an unheard idea anymore (Roux, 2018a). Nowadays, it is a routine practice to consider economic, political and historical context of court decisions. The increasing tendency to govern through courts termed as judicialization of politics has led to charges of politicization (Volcansek, 2019, 67). Hirschl (2008, 98) distinguished between "ordinary" judicialization of politics and judicialization of "mega-politics", the latter concerning political issues that "define the boundaries of the collective or cut through the heart of entire nations". Scholars have

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attempted to see these developments in a bigger picture and identified three distinct global waves of judicial review challenging the dominant narrative of progressive constitutionalism. They have described the third wave as a response to emergence of domestic constitutional jurisprudence, which had incorporated international standards as the source of higher law. According to these authors, the third wave is in dialectical relation with the other two in that it either reaffirms primacy of the domestic constitutional order over the international and emphasizes the discourse of national identity, or altogether exits the first and second waves (Lustig, Weiler 2018). This perspective has also been challenged connecting the emergence of constitutional identity discourse to broader social change brought by populist turn of politics (Versteeg, 2019). Contemporary trends in judicial review can be approached from various dimensions and angles, however, the purpose of this paper is different, namely, it will inquire into judicial approaches of mitigating charges of politicization.

Scholars have recognized limits of judges in putting through their subjective preferences into decisions, claiming that such subjectivity is always constrained by law (Zreik 2019, 222, 229) and judicial methodology (Rosenfeld 2019, 39–40, 47) that judges apply. Indeed, there are clear differences between political and judicial decision-making, the former does not carry the same argumentative burden, that will constrain the latter. Given extraordinary social and political circumstances, there may be exceptions, when even the very clear rules in the Constitution are not obstacles. Example of this is the Indian Supreme Court's jurisprudence turning Directive Principles of State Policy (DPSP) into justiciable social rights, when the Constitution had already decided against such interpretation. As widely recognized in the literature, the Supreme Court's move to pro-poor jurisprudence in this manner had to be explained in the political context of that time, namely the need to regain institutional credibility due to the Court's notorious failure to oppose the political repressions during the Emergency of 1975–1977 (Roux 2018a, 204).

The role of judicial agency in building the political and legal circumstances affecting the future operation of the Court is generally overlooked. Whether it is an “insurance theory” by Ginsburg (2003) or “hegemonic preservation theory” by Hirschl (2007) that explains empowerment of courts in national politics, judicial agency has a lot to determine when courts embark on their mission of embracing the

political circumstances surrounding them. Strategic adjudication carries the awareness of likely political repercussions with the aim to “maximize the chances” that the decisions will be enforced. In turn, with each decision enforced, prospects of future opposition to court decisions decreases (Roux 2018b, 22). Risks of political backlashes is reduced when urgent need for some form of intervention is recognized by a wider public, sometimes openly through mass protests on the issues to be decided by the Court. Public health emergencies as HIV/AIDs pandemic in South Africa (Young, Lemaitre 2013), failure to deal with famine in India (Pillay 2014, 395–396), have made politicization of apex courts possible perhaps without loss of public legitimacy. This is one strand of strategic adjudication by courts, in which success of courts is determined by public perception of the extreme need to act. However, judicial agency is not only observed in such cases and it can more generally characterize courts’ jurisprudence. Such posture of the South African Constitutional Court has been reconstructed by scholars, arguing that in the political context of a dominant party democracy, the Court has been strategic to build institutional legitimacy and created “doctrinal space” for its future “context-sensitive” adjudication (Roux 2009, 116).

The present paper will discuss judicial techniques from the perspective of two line of cases decided by the Israeli Supreme Court and will ask whether Wechler’s insistence on neutral principles (1959) can be useful for that discussion. For this purpose, first the arguments of the Legal Process School will be summarized.

2. LEGAL PROCESS SCHOOL

Legal Process School as a response to legal realist’s indeterminacy thesis and critique of the law as an autonomous, “self-contained body of norms” has attempted to provide solutions to weakened institutional respect for courts (Roux 2018a, 206). Scholars in that school emphasized the importance of neutral, “impersonal and durable” (Bobbitt 2010, 142) principles constraining the indeterminacy of law and subjectivity of judges. Important goals were consistency and respect that constitutional adjudication had to attract, despite the inevitable possibility of pursuing one or the other policy preference through adjudication (Duxbury 2010, 287). Illustration of the core ideas behind

Legal Process School would be impossible without reference to *Brown v. Board of Education* decision by the U.S. Supreme Court and the criticism that it attracted. Wechsler flagged the famous critique of the Supreme Court's reasoning and the damage it could do to the legitimacy of constitutional interpretation. According to the criticism, even if the political adjudication served good purposes, such as desegregation of schools, judges had to refer to principled basis while doing so, which could not be reference to harmful effects of segregation on children. As he reasoned, there was reason to believe that contrary was true, as integrated schools may have proved more hostile in fact. Wechsler considered alternative justifications for the decision, which would not be linked to actual effects of segregation, rather neutral principles that would apply both to blacks and whites equally, such as the prohibition against state interference with freedom of association, which as he argued, would have better escaped the charges of politicization (Wechsler 1959, 32).

Search for neutral principles was a response to realists who were discussing the problem of judicial indeterminacy. The solution, although imperfect when applied to broadly construed rights and their conflicts (Dexbury 2010, 287–288), made an important contribution. The solution-oriented perspective at minimum kick-started a discussion on the importance of appearance of neutrality, even if judicialization of politics seemed inevitable. Even if judges wanted to steer policy in a specific direction, according to Legal Process School, this should be done in a judicial, not a political manner, judges required to substantiate their decisions had to apply general principles which would constrain the courts' discretion in future cases as well.

Insights from the Process School can be guiding for finding solutions in the modern context of judicialization, too. It should not come as a surprise that whatever course judges take, be it deferential or activist their decisions will not completely escape the political dimension, but in light of the legacy of Legal Process School, non-political, alternative way of doing that shall be preferred. Courts may engage in a principled, consistent line of reasoning across its evolving jurisprudence on the same political issue, first exhaust the more solid legal arguments in their hands, ensure that these less controversial decisions are enforced first, before they impose a conclusive constitutional resolution of the issue. Meanwhile, the strategy of consciously skipping the first opportunity of imposing a specific solution contributes to more

political consolidation. The decision not to instrumentalize the law at the very first occasion, despite a discernible preference in the Court's analysis, brings to the fore the Court's non-political, impartial way of operation. The two cases below decided by the Israeli Supreme Court will be discussed to support the claim.

In the case of *Ressler v. Knesset*¹ decided in 2012 the Israeli Supreme Court for the eighth time discussed the issue of deferring ultra-orthodox Yeshiva (rabbinical seminary) students and decided that such exclusive exemption from military service contradicted the equality rights of Israelis in the Basic Law: Human Dignity and Liberty. In Israel, law establishes the duty to serve in the military for all. This made the exemption exceptional as it operated exclusively for this group. The exemption was the source of division between secular and religious Jews since the creation of the state. One practical reason for such exclusive treatment was the political position of the ultra-orthodox Jewish parties, who despite their size, play a significant role in maintaining government coalitions and could demand pro-exemption policy as a political compromise in exchange for their support (Navot 2014, 85–87). For understanding the 2012 decision of the court in its full context, the preceding decisions have to be summarized, too. In the first cases, the court was more deferential to the political solution of the issue, and towards the end became more robust in its scrutiny. For the purposes of this paper, it would suffice to consider the two judgements before the final one discussed above.

In 1998 the Supreme Court stated that the deferment authorized only by the executive – Minister of Defense, without prior and explicit authorization of the Knesset was unlawful. The Court based its arguments on the considerations of Separation of Powers and Rule of Law and stated that issues that penetrate the nation and divide the society, has to be decided by the legislative branch of the country. This was discussed under the rule of primary arrangements, based on which the Knesset has the duty to set the appropriate boundaries, within which the administrative authority can act. The court referred to its previous decision, in which it already hinted that number of deferments by the Minister may indicate a point when “quantity becomes quality” (*Ressler v. Knesset*). In other words, because the arrangement had expanded and the number of exempted students had grown from hundreds to thousands, it became a national issue, which had to be

¹ ISC, case HCJ 6298/07, *Ressler v. Knesset*.

decided by the Parliament². Following the decision, Knesset adopted a temporary (valid for five years) legislative solution on this issue. The law adopted by Knesset reaffirmed the exemption of Yeshiva students, however introduced incentives for them to opt for a short military service (Weintal 2013, 299).

The case came back to court in 2002. In 2006, the Court decided that the law as it stood violated equality rights, however, refrained from declaring its unconstitutionality. The Court explained that although the data available now showed that the law's objective (equal distribution of the security burden) and incentives to integrate Yeshiva students to military service despite exemption was not realized, rational connection between those and the means adopted had to be also tested in practice. In this way, the Court gave more time to the elected branches to fix the problems of implementation. As the court elaborated, what still remained to be seen in time was whether the law had a "genetic" defect, or the problem laid with its implementation.³ As stated in the beginning, finally, in 2012, the Court concluded that indeed, those defects were related to the law's inherent unequal nature and 10 years of unsuccessful implementation proved precisely this. The Court relying on data regarding the implementation of the law indicated that it demonstrated how the law entails "inherent impediments that significantly influence the possibility for giving it effect and realizing its objective" (*Ressler v. Knesset*). Eventually, the Court ordered that the Knesset draw up a new law, that would simultaneously consider equality requirements and address the special circumstances of ultra-Orthodox Jews in relation to military service (Kahana 2013, 83–84).

The case is interesting from various perspectives, for instance in terms of the role of ultra-orthodox minority in Knesset for creating government coalitions and the convenience of delegating to court the decision on a long-standing political controversy. As Hischl (2008, 106) has brought to attention, in certain circumstance "judicialization from above" is a better explanation of the court's activism. Namely, judicial resolution of a politically sensitive issue may fit with the blame-shifting strategy of elected branches. However, for the purposes of the paper, emphasis will be placed on judicial techniques and agency. Already in 1998, the Court started to point out problems of the policy, however

² ISC case HCJ 3267/97, Rubinstein v. Minister of Defence.

³ ISC case HCJ 6427/02, Movement for Quality Government in Israel v. The Knesset.

it was not until 2012 when it delivered a more conclusive judgement now against the policy formulated by Knesset. First, the policy was rejected because according to the Court's decision, the nature of the issue required political deliberation in Knesset. Next, it was rejected due to more substantial grounds of the exemption law. Although the Court left the decision on specificities of the policy to the democratic branches, instructing them to respect both equality of Israelis subject to military service and interests of the Yeshiva students, the Court conclusively rejected the government's vision of pursuing those goals as present in the law before the Court at that point.

Another line of cases decided by the Israeli Supreme Court that illustrates the argument of the paper is *Maccabi Healthcare Services v. Minister of Finance*.⁴ The legal dispute was between health funds and the Government and related to updating of the health cost index – the mechanism that did not reflect the real costs of the health system. Before going into details of the Court decision, it is important to briefly describe the Israeli health system. Health services in Israel are provided by four health funds, which act as intermediaries between the state and providers of health care. Health funds receive resources calculated according to age and number of beneficiaries and cannot demand additional payments for the basic coverage. The National Health Insurance Law (NHIL) establishes a procedure for renewing the cost of services in the Health Services Basket (HSB) by the rate of increase in the cost of health index. However, the calculation rule for the health index was not comprehensive and did not relate to demographic changes and new technologies, thus did not reflect the overall increased cost of health care (Flood, Gross 2014, 159–168; Carmel, Chinitz 2005, 651–656).

The shortcomings of an updating mechanism in the end led to recommendation of the Health Council, a statutory advisory body, to introduce an automatic updating for HSB, considering the relevant increased expenses. The health funds addressed the Supreme Court first in 2000 to obtain a decision against the state, requiring that the Government complied with the Council recommendation. The Court did not issue a binding ruling but explained that the recommendation had to be considered before reaching a decision. Next, in the case decided in 2002, the Court emphasized that the Health Council is an advisory body and consideration of recommendation from the side of

⁴ ISC, case HCJ 2344/98, *Maccabi Healthcare Services v. Minister of Finance*.

the government was sufficient. Despite ultimate deferential stance of the Court, the decision already expressed frustration with the Government's inaction. It criticized the Minister's argument that budgetary constraints can be indicated for non-fulfillment of statutory obligations set by NHIL. The Court explained that when there was a right, in this case a right in the statutory provision, there needed to be a remedy, not vice versa, so the government had to provide sufficient funds for the services under the health care plan. The Court here as well gave an option to the Government, to either amend the scope of rights in the law or modify the budgetary framework to respond to increased expenses. Nonetheless, despite harsh language used, as noted, eventually, the Court did not order the Minister to grant the requests of health funds (Flood, Gross 2014, 159–168; Carmel, Chinitz 2005, 651–656).

The Court's position changed in 2012 when it recognized the protracted failure of the Government to address the real changes in prices and held it to be unreasonable (*Maccabi Healthcare Services v. Minister of Finance*). In the end, as a remedy, the Court instructed the Government to modify the mechanism of updating the health cost index within 6 months. The Court used a weak remedy and again gave considerable freedom to the elected branches to come up with the updating mechanism (Gross 2014, 167; Gross 2013, 319). Although the authority to define the exact method of calculating the health index still fell to the elected branches, after a decade, the Court felt in a better position to intervene.

These cases are illustrative of the Court's slow technique of reaching a decision against Government policy. Evolution of the jurisprudence manifests a specific way of accumulating legitimacy for the court's preferred interpretation. In the first case, considering the political sensitivity of the issue, the Court consistently developed its objections against the policy and after decades of political branches' inability to resolve the controversy, decided to take a more principled stance. Similarly, in the second case, the Court gave a benefit of doubt to the Government that it could recognize its failures and take measures to address them. Initially alternative legal arguments were exhausted, in the Ressler case the doctrine of "primary arrangements" is invoked, and in the Maccabi case, the statutory right is relied on. Recourse to alternative arguments allows the court to gain time, have its institutional security built up as the decisions on those alternative grounds get implemented. In this manner, when the government proves ignorant to-

wards the substantive arguments in the decision, the court faces the new legal challenges with somewhat bolstered institutional security, better placed to resolve the issue on a substantive constitutional level. Time in these cases is a valuable tool for the Court, which allows it to nurture its institutional claim on neutrality when the final decision on the issue is rendered.

3. CONCLUSION

The cases above do not as such illustrate a novel perspective into judicial review. Already in 2003, Tushnet discussed the possibility of weaker judicial remedies turning into stronger ones, once the government proved disobedient to the former (Tushnet 2003, 831–832). As Dixon and Issacharoff (2016) formulated “living to fight another day proves to be an attractive option in judging as in all matters of statecraft”. Such flexible forms of review have addressed Separation of Powers objections, as expressions of deliberative democracy⁵ encouraging political accountability of failing government institutions (Sabel, Simon 2004, 1020). However, these justifications have not eliminated the risks of backlashes from political branches. Perhaps, to avoid those, it is best for Courts to embrace political aspects of adjudication and behave strategically and to do so through legal means available, as principled, incremental legal reasoning will aid the legitimacy of the Court’s arguments.

Techniques of achieving public legitimacy may differ, change and adapt to different circumstances, but the perspective that judiciary will have to do more than decide cases in a manner that political bodies decide policy – the underlying logic behind Legal Process School – is as crucial as before. Even if courts survive backlashes from political branches because they act strategically, that will not lead to its institutional legitimacy as a legal actor. That being the normative goal to pursue, judicial strategy shall be translated into consistent legal reasoning. Pragmatic decisions of the Court have to be backed up by legal techniques that at minimum manage to maintain appearance of impartiality. Such appearance will bring more public legitimacy that

⁵ Arguments about dialogic justice have been extensively addressed in the literature on judicial enforcement of socio-economic rights, see (Gargarella 2011, 233–237, 243; Liebenberg, Young 2015).

will have a better chance of playing a preventive role against political backlashes (Volcansek 2019, 66–68). Enduring judicial independence is one that will be built on court's reputation as a legal actor, rather than a strategic political one (Roux 2018b, 31).

What is argued here is that judicial agency has more bite in the construction of its own fate than generally recognized. Courts can ease decision-making by cooling down the political and advancing the legal sides of the issues considered. The Court's commitment to consistent arguments in its journey from weak to stronger remedies and use of the time and evidence in-between, can be a technique to at least mitigate charges of politicization. The court's timidity to impose its views on the very first occasion, inclination to first test the alternative, perhaps more solid legal basis, and obtaining more institutional security once these less controversial decisions are implemented, is one way to do that. This prolonged process of accumulating institutional legitimacy through time and more evidence creates more potential for incompletely theorized agreements both inside and outside courtroom as well (Sunstein 2007).

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Sava Vojnović*

KRITIČKA DOPUNA RADBRUHOVE TEORIJE O MORALNOJ ODGOVORNOSTI SUDSTVA

Pod uticajem političko-istorijskog konteksta u periodu neposredno pre i tokom II svetskog rata – Gustav Radbruch je nakon rata postulirao formulu nepodnošljivosti i formulu poricanja. Kroz formule Radbruch je predočio svoju tezu da sudija ne bi trebalo da primeni pravo koje je izrazito moralno nepodnošljivo, što znači da krši načelo jednakosti, koje je ujedno srž pravde. Problem sa takvim ovlašćenjem sudije se neumitno nameće kroz pitanje subjektivnosti pojedinačne procene, jer se pravda procenjuje u odnosu na neke vrednosti, što je čini relativnom. Taj zahtev pravde nam ne govori koga treba smatrati jednakim. U ovom radu biće pokušano da se pronađe rešenje kojim bi se pravna sigurnost najmanje ugrozila moralnim relativizmom i to polazeći od Kelzenovog i Rolsovog razmatranja pravde, kao i od pretpostavke da je cilj prava da služi pojedincima zajednice koju reguliše. Biće preispitano da li je konzistentnije modifikovati Radbruchovu ideju i demokratski utemeljiti jedno nezavisno telo sa nadzakonskim ovlašćenjem.

Ključne reči: Radbruch, formula nepodnošljivosti, pravda, relativizam, konsenzus

1. UVOD

Pod uticajem političko-istorijskog konteksta u periodu neposredno pre i tokom II svetskog rata – Gustav Radbruch je nakon rata postulirao formulu nepodnošljivosti i formulu poricanja. Kroz formule Radbruch je predočio svoju tezu da sudija ne bi trebalo da primeni pravo koje je izrazito moralno nepodnošljivo, što znači da krši načelo jednakosti, tačnije da se može smatrati odgovornim ukoliko ga primeni. U ovom radu biće pokušano da se pitanje jednakosti izvede do kraja, tačnije da se preispita odnos jednakosti i pravde, pošto je Radbruch isticao da je prvo srž drugog. Da bi se to uradilo, neophodno je prethodno izložiti Radbruchovu teoriju pre pomenutog istorijskog trenutka, s obzirom na to da

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je ona konzistentna i da predstavlja dobar korektiv i osnovu za analizu kasnije teorije. Pitanje pravde je tesno povezano sa samim shvatanjem prava, što svakako ukazuje na važnost Radbruhove iscrpne teorije o pravu i o bliskim pitanjima. Najvažnije od bliskih pitanja jeste pitanje moralnosti – spora oko vrednosti, kao relativnih ili objektivnih pojmova, jer su pravo i njegovi elementi neraskidivo zavisni od njega. Tom putanjom je poželjno kretati se prilikom sagledavanja jednakosti kao vrednosti i merila pravde, iako relevantnost problema jednakosti jenjava u svetlu Radbruhove kasnije dopune, koja se odnosi na kategoriju ljudskog dostojanstva. U izloženom kontekstu, biće pokušano da se pronađe rešenje kojim bi se uskladili različiti zahtevi vrednosti (elementi) u okviru samog prava, a polazeći od pretpostavke moralnog relativizma i stava da je cilj prava da služi pojedincima zajednice koju reguliše. Oslanjajući se pre svega na Hans Kelzenovo i Džon Rolsovo razmatranje pravde, u ovom radu će biti ponuđena jedna modifikacija i dopuna Radbruhove ideje.

2. RADBRUHOVA PRAVNA FILOZOFIJA PRE 1945.GODINE

Iz navedenih razloga u uvodnom delu teksta, neophodno je prethodno izložiti makar temelje Radbruhovog filozofskog, pa time i pravnog sistema – koji su uspostavljeni u njegovom kapitalnom delu „Filozofija prava“ iz 1932. godine. Bavljenje Radbruhovom filozofskom osnovom će biti od značaja i za kritičku dopunu, koja će se u velikoj meri bazirati na sličnim pretpostavkama i razmišljanjima.

2.1. Metodski dualizam i relativizam

Prva značajna polazna premisa u Radbruhovoj teoriji jeste razdvajanje sveta *Sein* (Biti) i *Sollen* (Trebat), što predstavlja srž *metodskog dualizma* (1980, 18). Nadovezujući se na Imanuela Kanta, Radbruh zaključuje da je „nemoguće iz onoga što jeste dokučiti šta ima vrednost – šta je ispravno (šta treba da bude)“, zbog čega odbacuje pozitivizam, istorizam i evolucionizam, kao filozofska polazišta koja ne smatraju da postoji takva prepreka. Dalje, objašnjava Radbruh, vrednosni sudovi se mogu zasnivati samo deduktivno, na stavovima iste vrste, a nikako induktivno – na stavovima o biću. Odgovarajući na čest pravnički zahtev da se ispravno regulisanje izvede iz datog konteksta

– on ističe da iz perspektive metodskog dualizma, određenost ideje samom građom koju ona treba da oblikuje može biti samo srećan slučaj intuicije, a nikako metod saznanja (Radbruch 1980, 19). Međutim, to ne znači da ne postoji kauzalitet između vrednosti, odnosno vrednovanja s jedne strane, i bića s druge strane – već samo to da ne postoji mogućnost objašnjenja i opravdanja vrednosti iz bića (Radbruch 1980, 19). Upravo zbog značaja Kantovih zaključaka, koji se tiču iskustva kao nužne inicijalne tačke u celokupnom ljudskom epistemološkom putu – jasno je da se ne može iskustvo, to jest u ovom slučaju *Sein*, odstraniti kao element bez uticaja.¹ Ali, krajnji vrednosni stavovi nisu podložni dokazivanju, već se smatraju aksiomatskim, odnosno podobnim samo za verovanje² (Radbruch 1980, 20). Posledica toga jeste zaključak da se naučno posmatranje vrednosti (na temeljima logike³) ograničava samo na htenje, a ne i na moranje. Ipak, kaže Radbruch, nije zadatak pravne filozofije da takve sudove promatra samo deduktivno, već i induktivno – od pojedinačnog ka krajnjim pretpostavkama (1980, 20). To traži doslednost u okviru samog moralnog sistema pojedinca, što bi na primeru filozofa prava značilo da prilikom odmeravanja nekog normativnog cilja mora prihvatiti i sredstva u nužnoj vezi sa tim ciljem, kao i opštija vrednovanja, logički povezana. Zadatak prikazanog metoda nije da odredi cilj, već da ga razjasni i potencijalno ispravi – u odnosu na rastojanje između mišljenog i realnog. To se naziva *relativizmom*, jer „sebi postavlja zadatak da utvrdi ispravnost vrednosnog suda ... samo u okviru određenog pogleda na vrednost i svet“ (Radbruch 1980, 23).

Sam Radbruch ne definiše pojam vrednosti, te bi bilo svrsishodno to učiniti pre dalje analize. Iako razmatranje aksiologije nije fokus ovog rada, važno je makar letimično ga izložiti, jer će to biti težište kasnije argumentacije. Polazeći od Dragomir Pantićeve definicije⁴ – vrednosti

¹ Čoveka, kao kulturno biće, nesumnjivo oblikuju mnogi uticaji socijalne sredine. Relevantan aspekt Kantove teorije za temu ovog rada se tiče početnog elementa našeg saznanja – opažaja. Čak i bez zalaženja u distinkciju između noumena i fenomena, dovoljno je istaći da je dodir sa svetom izvan subjekta preduslov razumne obrade utisaka (sinteze), koji se zatim formiraju u pojmove, iako postoji i određeno apriorno saznanje, koje se prevashodno odnosi na formu mišljenja. Takođe, nakon razuma, u umu se vrši sinteza pojmova iz razuma – usled čega se formiraju ideje. (Kant 1976; 51, 83–95, 188–201, 222–241).

² Za primer jednog od drugačijih mišljenja – videti Alexy 2015.

³ Prim. aut.

⁴ „Vrednosti su relativno stabilne, opšte i hijerarhijski organizovane karakteristike pojedinaca i grupa, formirane delovanjem istorijskih, aktuelnosocijalnih i individualnih činilaca, koje zbog tako pripisane poželjnosti, usmeravaju ponašanje svojih nosilaca ka određenim ciljevima“ (Pantić 1997, 277).

bi se mogle odrediti kao jedan subjektivni odnos pojedinca prema stvarnosti, što znači da za svoje formiranje zahtevaju slobodnu volju kao preduslov, čija je srž poželjnost, odnosno usmeravanje ponašanja ka određenim ciljevima. „Individualni činioči“, kao element definicije iz fusnote, su veoma značajni za način organizovanja vrednosti u šire sisteme, intenzitet i vezu vrednosnih elemenata – svi socijalni faktori se prelamaju kroz prizmu konkretnog pojedinca (Pantić 1997, 279). Posledica takvog stava je pomenuti moralni relativizam, kao nemogućnost objektivizacije vrednosti, jer postavlja svakog pojedinca u jednako afirmativan položaj prema vrednosnom sistemu. Značaj tih zaključaka se ogleda u uticaju koji oni mogu imati na debatu o pravnom pozitivizmu, odnosno vezi između prava i morala, što je fundamentalni element Radbruchovih formula nakon Drugog svetskog rata. Zbog ograničenosti kapaciteta rada – ovde će biti samo spomenuta tvrdnja da moralni relativizam čini osnovu pravnog pozitivizma. Posmatrano kroz poređenje Kelzenovog i Herbert Hartovog pravnog stanovišta – to predstavlja jedan od zaključaka istraživanja zasnovanom na iscrpnom članku Miodraga Jovanovića (2013b), na koji čitalac ujedno biva upućen radi detaljnijeg uvida.

2.2. Pravo i njegovi sastavni delovi

Centralno mesto u Radbruchovom teorijskom okviru svakako zauzima, pored relativizma, sama *definicija prava*, zajedno sa elementima koji ga čine. Na početku je značajno naglasiti da, po njegovom mišljenju, pravo predstavlja jedan kulturni pojam – „pojam jedne stvarnosti povezan sa vrednošću ... čiji je smisao da služi nekoj vrednosti“ (Radbruch 1980, 44). To znači da pravo, nezavisno od toga da li postoje prirodna ili univerzalna prava, uvek štiti, odnosno zastupa neke vrednosti. „Pravo je ona stvarnost čiji je smisao da služi pravnoj vrednosti, ideji prava. Pojam prava je dakle usmeren na *ideju prava*. Ideja prava, pak, ne može biti ništa drugo nego pravda“ (Radbruch 1980, 45). Da li će se te vrednosti odrediti kao „istinite“ ili ne, ne utiče da činjeničnu vezu prava i morala⁵. Upravo zato se čini neispravnim Kelzenov stav, da se pravna norma kao imperativ („trebanje“) može shvatiti samo kao formalan, hipotetički sud koji izražava specifičnu povezanost nekog uslovljavajućeg činjeničnog stanja sa nekom posledicom (2007, 23). Pravna norma nesumnjivo to jeste, ali je ujedno i vrednosni sud. Tvrdnja, koju Kelzen takođe iznosi, da

⁵ Prim. aut.

na temelju moralnog relativizma možemo vrednosno izjednačiti pravni poredak Sovjetske republike sa fašističkom Italijom (2007, 25) – sasvim je različita od ideje da je pravo lišeno vrednovanja.

Dalje, pravdu možemo shvatiti kao oblik moralnog dobra, ukoliko je učinimo vrlinom po sebi, odnosno odredimo kao duhovnu namstrojenost. Međutim, takva pravda je subjektivna i prosto usmerena ka objektivnoj pravdi, o kojoj je ovde reč. Ta objektivna pravda se tiče međuljudskih odnosa i njen ideal se odražava u idealu društvenog poretka. Osim toga, pravda se može odrediti još dvojako: kao zakonitost – pravedna primena zakona, ili kao pravedan zakon (Radbruch 1980, 46). U tom smislu, Radbruch pravdu vidi kao jednakost, iako odmah nakon te konstatacije ističe mogućnost raznolikog tumačenja jednakosti. Ne samo što se može ticati dobara ili ljudi, već se, oslanjajući se na Aristotelovu podelu na distributivnu i komutativnu pravdu – može postaviti pitanje koga treba tretirati kao jednakog, a koga kao nejednakog? Distributivna pravda uspostavlja jednakost između nejednakih – dovodi ih u jednake pozicije (dok komutativna dejstvuje u odnosu na jednake⁶), što ukazuje na to da je distributivna pravda prvobitni oblik, u kojoj se nalazi ideja pravde na koju pravo treba da se orijentiše. Ali, time Radbruch ne tvrdi da se pravo može izvesti u potpunosti iz pravde, upravo zato što je jedan takav zahtev samo formalan. Pomenuto pitanje merila jednakosti se ne da prevazići, jer „jednakost nije nikakva datost ... jednakost je uvek samo apstrahovanje od date nejednakosti sa jednog određenog gledišta“ (Radbruch 1980, 47). Materijalno (vrednosno) dopunjavanje formalnog zahteva za jednakošću direktno upućuje na određena načela izvan same pravde. Ovo mesto će biti ključno za razumevanje kasnijeg preokreta u pogledu odnosa između pravne sigurnosti i pravde.

Potom, elaborira Radbruch, neophodno je saznati vrstu stvarnosti koja bi trebalo da služi pravdi, jer je pravda zapravo ispravnost u usmerenosti ka pravu (1980, 49). Novi pojam koji biva uveden, kao vid jedne posebne stvarnosti koji odgovara ideji prava – jeste nalog. „Nalog ima sa pravdom zajednički predmet na koji se odnosi: međusobni odnos ljudi. ... u suštinu pravnog naloga spada da po svom smislu bude usmeren na jednakost, da u sebi nosi karakter opštosti“ – na osnovu čega dolazi do definicije *pojma prava* kao skupa naloga za zajednički život ljudi (Radbruch 1980, 50).

⁶ Naslanjajući se na Aristotelovu podelu, Radbruch u distributivnoj pravdi vidi raspodelu sprovedenu uz učešće trećeg lica, odnosno zahteva više od dva učesnika pri raspodeli – dok je za komutativnu pravdu dovoljno dvoje, jer ona predstavlja jednakost dobara (štete i naknade, rada i nagrade...).

Osim pravde, kao fundamentalnog principa prava, još su dva konstitutivna pojma: svrsishodnost i pravna sigurnost. Pojam svrhe prava Radbruch uvodi kao sadržinski korektiv formalnom zahtevu pravde, naglašavajući da je reč o nadempirijskoj ideji svrhe – čiju suštinu moramo odrediti kroz apsolutne vrednosti (1980, 71). On te aksiomatske vrednosti pronalazi u tri (iskustveno) najčešća predmeta: ljudska dela, pojedinačne i kolektivne ličnosti, čiji su pandani vrednosti dela, individue i kolektiva. Moglo bi se reći da je to pokušaj razlikovanja i sagledavanja tri bazična pogleda na svet, u okviru kojih svaki polazi od drugačijih vrednosti. Da bi se odredila svrha prava – između njih mora jedno da se odabere. Time nam već ukazuje na sukob unutar svrsishodnosti kao jednog elementa, što će biti od uticaja i na antinomiju nje same sa pravdom i pravnom sigurnošću. Ukoliko se prednost da slobodi kao vrednosti, onda će biti reč o individualističkom shvatanju; dok nacija upućuje na nadindividualističko, a kultura na transpersonalističko shvatanje (Radbruch 1980, 75). Odlika sva tri svetonazora je osobenost kao vrlina, kao težnja svakog od tri. Time nam Radbruch već stavlja do znanja da pravda, kao opšti princip jednakosti, dolazi u koliziju sa svrsishodnošću – zbog njenog relativističkog temelja, koji ne želi jednakost. S druge strane, „pravo kao poredak zajedničkog života ne može ostati prepušteno razlikama u shvatanjima pojedinaca“ (Radbruch 1980, 95). To nesumnjivo govori o novom potencijalnom sukobu – ovog puta između pravne sigurnosti i ostala dva elementa, jer i tri pogleda na svet i pravda ciljaju ka vrednostima koje se nalaze iznad važećeg prava. Za razliku od toga, pravna sigurnost traži pozitivnost prava i time na neki način sebi pridaje legitimnost, odnosno ispravnost, te kada već nije moguće odrediti šta je pravedno – onda se mora makar propisati šta je po pravu. Važnije je postojanje sigurnosti, oličeno u pravnom poretku, nego pravde i svrsishodnosti (Radbruch 1980, 95). Ovakav zaključak je *prima facie* opravdan, međutim, interesantno je ukazati na jednu kontradiktornu činjenicu da, sa aspekta relativizma – pravnoj sigurnosti, kao vrednosti, možemo suprotstaviti stav da ona nije vrednost, koji će onda biti podjednako istinit (Spaak 2008, 271).

2.3. Važenje prava i odgovornost sudije

Poglavlje o važenju prava predstavlja, za potrebe ovog rada, poslednje značajno pitanje u okvirima pomenutog dela iz 1932. godine. Koherentnost dosadašnjih ideja se krajnje oblikuje kroz stav da se stvaranje pravnog poretka ne sme prepustiti pojedinačnim pravnim

gledištima, već da ga mora regulisati jedan nadindividualni organ (Radbruch 1980, 107). Opravdanje sile ima svoje korene u nemogućnosti uma i nauke da pronađu ispravno pravo. „Onaj pravni poredak će važiti koji je u stanju da sebi pribavi faktičku delotvornost“ (Radbruch 1980, 103), pri čemu se ne traži delotvornost u svakom konkretnom slučaju, već u proseku slučajeva. Radbruch nam time predočava osnov za opravdanje i povezivanje prava sa silom, jer „ne važi pravo zato što može da se uspešno sprovede, nego kad može ... a zato što samo tada može da pruži pravnu sigurnost“ (1980, 109). Dakle, pozitivno pravo legitimiše i nepravdu i nesvrishodnost, što prouzrokuje nužnost sudijskog obavezivanja propisanom pravu, čak i uprkos tome što iz njegove perspektive određeni propis nije u skladu sa pravdom. „Sudija ne treba da zna ni za koju pravnu teoriju važenja do za onu koja smisao važenja zakona ... izjednačuje sa stvarnim važenjem. ... samo da pita šta je po pravu i nikada da li je to pravedno“ (Radbruch 1980, 110). Najzad, u slučaju kada je optuženi prekršio, iz svoje perspektive – nepravedan propis, sudija je dužan da ga kazni. Za optuženog, prekršaj je bio moralna dužnost, jer za njega pravo može imati moć prinude (moranje), ali ne i važenje (trebanje). Time je zaokružena pravno-filozofska celina, koja dobija svoj zaokret u kasnijim člancima, o čemu će biti u reči u narednom poglavlju.

3. PROMENJENA TEORIJA NAKON 1945. GODINE I KRITIČKA DOPUNA

Pod uticajem zastrašujućeg konteksta Hitlerove vladavine i pozitivnog prava koje se tada primenjivalo, Radbruchova izložena koncepcija dobija jednu novu perspektivu i u određenoj meri drugačije ruho. Nationalsocijalistički pogled na svet i vrednosti koje je takav režim zastupao su danas dovoljno poznate, a ovde će biti uzgred sagledano nekoliko najvažnijih pravno-političkih činjenica iz tog perioda. 1934. godine u Berlinu je formiran Narodni sud, kojem je dodeljena uloga procesuiranja slučajeva veleizdaje, kao najviša sudska instanca za političke slučajeve. Roland Frajsler, sudija tog suda, je za dve i po godine osudio 2 500 ljudi na smrtnu kaznu (Volić-Hellbusch 2012, 39). Takođe, novim „Zakonom o ukidanju nevolje naroda i države“⁷ – vlada je dobila ovlašćenje da donosi protivustavne zakone, bez upliva parla-

⁷ Gesetz zur Behebung der Not von Volk und Reich, 1933.

menta, kao i sve zaštite protiv policijskih mera. Ideologija je zahtevala sudijsku fleksibilnost, u smislu poštovanja i ostalih vrednosti izvan zakona – poput zloupotrebljene pravde, koja se tumačila kroz pojam „zdravog narodnog razuma“, što se svodilo na neprikosnovenu Hitlerovu volju i procenu (Volić-Hellbusch 2012, 44).

3.1. Pet minuta filozofije prava⁸

Prvu značajnu promenu Radbruch ističe kroz problem bespomoćnosti pravника i naroda usled prethodno izložene teorije važenja, koja opravdava samovoljne i zločinačke zakone. Zamisao da je pravo „ono što koristi narodu“ bi značila da svaka čud despota, kazne i presude izvan zakona čine pravo (Radbruch 1980, 265–266). „Kada se slavi ubijanje političkih protivnika, kad se naređuje ubijanje ljudi neke druge rase ... onda to nije ni pravda ni pravo. ... Postoje, dakle, pravna načela koja su jača od svakog pravnog propisa, tako da je zakon, koji je suprotan njima, bez važenja“ (Radbruch 1980, 266–267). On ta načela naziva čak i prirodnim pravom, smatrajući da uprkos nedoumicama oko samog preciziranja tog pojma – on ipak ima dovoljnu i zasluženu čvrstinu.

Očigledno je da već u ovom članku nailazimo na drugačiji pristup u odnosu na sistem pre 1933. – pravna sigurnost počinje da gubi svoj apsolutni primat.

3.2. Zakonsko nepravo i nadzakonsko pravo⁹

Nadovezujući se na prethodni članak, Radbruch dodaje da se na sili može zasnivati neko moranje, ali nikako neko važenje ili trebanje – jer svet *Sollen* traži vrednost u odnosu na koju bi se zakon opravdao. Pošto će norma svakako da brani neku vrednost, onda je svaki propis bolji od nikakvog, ali pravna sigurnost nije presudna ideja koju bi pravo trebalo da ostvari (Radbruch 1980, 287). Zapravo, pravna sigurnost „zauzima neko čudno srednje mesto između svrsishodnosti i pravde“, dok je s druge strane zahtev i same pravde – da se pravo ne primenjuje ili tumači u jednom trenutku ili prostoru na jedan način, a onda na sasvim drugačiji način u drugom (Radbruch 1980, 288). Iz toga Radbruch dolazi do zaključka da u slučaju sukoba između pravne sigurnosti i

⁸ Radbruchov članak iz 1945. godine.

⁹ Radbruchov članak iz 1946. godine.

pravde, u suštini postoji sukob pravde sa samom sobom, što dalje vodi do krucijalnih predloga: „Sukob ... bi se mogao rešiti tako da pozitivno pravo ... ima prednost i onda kada je sadržinski nepravedno i nesvrshodno, osim u slučaju kada pozitivni zakon u toliko nepodnošljivoj meri protivreči pravdi, da ... mora odstupiti pred pravdom“ (1980, 288). To se u teoriji naziva *formulom nepodnošljivosti*. Ona je dopunjena *formulom poricanja*, koja ne samo što nepravедnim pravnim propisima daje epitet neispravnog, već im u potpunosti odriče pravnu prirodu. Shodno tome, za Radbruha nema sumnje da se Hitlerovom poretku ne može priznati pravnost – jer je „nacionalsocijalističko „pravo“ imalo suštinski zahtev da izbegne pravdu“ (1980, 289). Kao primer za to, on navodi izraženu Hitlerovu empatiju prema ubistvu Potempe, kao i paroli da nisu sva ubistva ista, naravno u ovom slučaju – u zavisnosti od političkih ciljeva. Formula nepodnošljivosti se, zajedno sa formulom poricanja, može protumačiti kao pokušaj pomirenja teze odvajanja i moralne teze¹⁰ (Leawoods 2000, 500), jer kompromisno daje prostora i jednom i drugom.

Ne zalazeći u to da li je reč o preobraćaju, daljem razvoju ili preokretu u Radbruhoj misli (u odnosu pozitivnog i prirodnopravnog stanovišta), o čemu svakako postoji debata, nesporno postoji promena. Upravo zbog povezanosti celovite konstrukcije Radbruhovog sistema sa formulama, priklonio bih se mišljenju da se nova teorija prevashodno tiče pitanja prirode prava, a ne praktičnog delanja sudstva.¹¹ Iako se, naravno, teorija implicitno odnosi i na sudsku praksu, teško se može odbraniti stav da je centralna dilema ponašanje sudija, a ne određenje pojma, odnosno ideje prava. Zato što se uloga sudije ne može razumeti bez prethodne debate o tome šta je pravo, čini se da je Brajan Biksova argumentacija neosnovana – brkaju se uzrok i posledica (Bix 2011, 52).

Centralna tačka u Radbruhoj misli jeste granica nepodnošljivosti, odnosno granica prava, koju on precizira na sledeći način: „kada se jednakost, koja čini jezgro pravde, prilikom donošenja propisa svesno osporava“ (1980, 288). Međutim, neobično je da, iako je svestan problema koji se tiču pravde kao isključivo formalnog zahteva za jednakošću – on nudi da se sudiji dozvoli da prenebregne pozitivno pravo

¹⁰ Teza odvajanja (the separability thesis) je stav u osnovi pravnog pozitivizma, koji tvrdi da pravo zasniva svoje važenje nezavisno od morala; dok je moralna teza (the morality thesis) suprotna (Leawoods 2000, 490).

¹¹ Uporediti: s jedne strane – Jovanovic (2013a, 156–157), a s druge – Bix (2011, 52).

u takvom slučaju. Naime, i dalje smo suočeni sa osnovnim tezama metodskog dualizma i relativizma: Nijedan vrednosni zahtev se ne može naučno obrazložiti, već se izvodi iz aksiomatskih polaznih pretpostavki. Gde je onda osnov za ovakvo oslanjanje na sudijsku procenu? Upravo zato što nam pravda kao jednakost ništa ne govori o tome koje slučajeve treba tretirati kao jednake, a koje kao nejednake – stojimo bespomoćno pred subjektivnim izborom pojedinca da odredi svrhu prava u odnosu na svoj pogled na svet i izvede pravdu kroz lični moralni sistem. S tim u vezi, ističe Torben Spak, pozicija meta-etičkog relativizma ne može biti kompatibilna sa formulom, a za onoga ko smatra da postoji konceptualna veza između prava i morala – možemo očekivati da veruje u objektivnost morala, makar kada se radi o ekstremnim slučajevima (Spaak 2008, 281). Jasno je da su ljudi međusobno različiti, a da ih onda društveni poredak, kroz davanje prava i nametanje obaveza pokušava učiniti ravnopravnim, ali neminovno uvek ostavljajući neke razlike netaknutim (Келзен 1998, 147). Zato se čini netačnom tvrdnja da je predstavljena granica univerzalna i jasno povučena (Leawoods 2000, 513). Primera radi – ateista, odnosno religiozno indiferentna osoba bi verovatno različite religije posmatrala kao jednake (jer je nevažno o kakvom bogu je reč, kada u njega ni ne veruje), dok bi ih teista posmatrao kao nejednake (Келзен 1998, 147). To su posledice unutar ranijeg Radbruchovog filozofskog sistema, koji se u ovom radu uzima kao validan. Sami instituti savremenog krivičnog prava, poput: nužne odbrane, krajnje nužde, stvarne i pravne zablude – dovoljno govore u prilog tome da postoji veoma širok dijapazon mogućnosti pri zakonodavnoj regulativi i tumačenju, naizgled istih, krivičnih dela.

Shodno rečenom, deluje da bi Radbruchovo rešenje (u formi kakvu on nudi) bilo suviše kompromitujuće u odnosu na pravnu sigurnost i nedovoljno opravdano sa aspekta izložene filozofije. Uprkos tome što i on sam naglašava da bi ovlašćenje odricanja od primene pravnog propisa mogao imati samo viši sud ili zakonodavac – ne menja se suština kritike. I dalje bi određenje moralne granice, kao i interpretacija zakona bili prepušteni subjektivnoj proceni jednog čoveka ili grupe ljudi. Čak i kada bismo pretpostavili da postoji mogućnost nekakve objektivne procene i kada bismo uveli nešto poput Brantovog pojma „vrednosti koje su neophodne za ljudski opstanak“, opet bi ostalo otvoreno pitanje različitih oblika tih vrednosti (Spaak 2008, 287). Ovo postaje pogotovo značajno u kontekstu posledica Radbruchovog stava, koje su dalekosežne, a vidljive kroz uspostavljanje krivične odgo-

vornosti sudija koji su primenjivali nacionalsocijalističke zakone, kao i samu ideju odbijanja primene pozitivnog prava. „Presuda nezavisnog sudije može biti predmet kažnjavanja samo onda kad bi on povredio upravo to načelo kome nezavisnost treba da služi – potčinjenost pravu. Ako se pomoću načela koje smo mi razvili može utvrditi da primenjeni zakon nije bio pravo ... objektivno postoji izvratanje smisla zakona.“ (Radbruch 1980, 292). To znači da bi bilo legitimno (retroaktivno ili ne) kažnjavati lica koja su, postupajući po pozitivnom pravu, kršila pravdu, shvaćenu iz jedne subjektivne perspektive. Tačnije, pitanje je da li bi Radbruch to uopšte video kao retroaktivnost, jer nije ni reč o pravu (Bongiovanni, Valentini, Sarto 2014, 751). Takav pristup je ujedno primenjivan i u nemačkoj sudskoj praksi nakon rata. O tome svedoči slučaj dvojice policajaca, Strelec i Kesler, koji su osuđeni po tadašnjem krivičnom pravu, zbog pucanja na dvojicu mladića, koji su preskakali Berlinski zid, 1989. godine.¹² Jedan od mladića je i ubijen, a policajci su se pozivali na drugo materijalno pravo, koje je važno u to vreme u Istočnoj Nemačkoj – „Zakon o granici“¹³, jer im je on formalno davao mogućnost da koriste vatreno oružje u cilju sprečavanja prekršaja (preskakanja zida), ako bi taj prekršaj mogao da dovede do izvršenja teškog krivičnog dela protiv Demokratske republike Nemačke. Slučaj je kasnije dospelo do Saveznog ustavnog suda Nemačke 1996. godine, koji je našao da su prekršena ljudska prava zajemčena međunarodnim pravom, pozivajući se i na objektivnu pravdu i na vrednosti koje je štiti krivično pravo (ECHR, app. no. 34044/96, 35532/97 and 44801/98, 10–14). Sud je istakao da se ne sme vrednost života podrediti zabrani prelaska granice, odnosno da se na ovaj slučaj može primeniti i Radbruchova formula – jer predstavlja izuzetne okolnosti, u kojima se krše zagarantovana načela, iako ujedno postoji i osnov za takvu radnju u jednom važećem zakonu (slučaj je došao i pred Evropski sud za ljudska prava¹⁴). Sem toga, primeri retroaktivnog postupanja su i dva usvojena zakona: „Zakon o ispravljanju nacionalsocijalističkog neprava u krivičnom pravosuđu“ i „Zakon o kažnjavanju nacionalsocijalističkih krivičnih dela“ (Radbruch 1980, 290).

¹² European Court of Human Rights, Streletz, Kessler and Krenz v. Germany, app. no. 34044/96, 35532/97 and 44801/98: 2001.

¹³ Gesetz über die Staatsgrenze der Deutschen Demokratischen Republik (Grenzgesetz), 25. März 1982.

¹⁴ ESLJP je takodje odbio uloženu predstavku (pravni lek) osuđenih, koji su se pozivali na diskriminaciju (ECHR, app. no. 34044/96, 35532/97 and 44801/98, 38).

U tom kontekstu, Hart navodi slučaj žene, iz 1944, koja je potkazala svog muža za govor protiv Hitlera i njegovog režima u cilju da ga se otarasi, iako nije imala dužnost da to učini (Hart 1958, 618–619). Žena je, 1949. godine pred sudom, osuđena za ilegalno lišavanje slobode, jer je njen muž usled denuncijacije bio uhapšen. Viši sud je na kraju odlučio da je žena kriva, iako je sud koji je osudio muža tada samo postupao po pozitivnom pravu, jer je to pravo bilo lišeno savești i osećaja za pravdu. Potom Hart ističe da, uprkos tome što bismo možda podržali kažnjavanje nemoralnog akta, ipak nam zapravo stoje na raspolaganju samo dve opcije: ili da ne bude kažnjena (što bi bilo pogrešno – kaže Hart), ili da se uvede zakon sa retroaktivnim važenjem (Hart 1958, 619). Koliko god da je neprijatno retroaktivno kažnjavanje, moramo se odlučiti za manje od dva zla (Hart 1958, 619). Hart ovde nudi rešenje suštinski iste prirode, kao Radbruchovo, samo u drugačijem obliku – čega je i on sam svestan. Ali, po njegovom mišljenju – iskrenost, otvorenost (*candour*) nije mali deo moralnosti, odnosno prava, a ono se izražava u transparentnoj žrtvi principa zarad određenih vrednosti. „Ako smo iskreni ... rekli bismo da pravo može biti pravo, ali suviše nemoralno da bi se poštovalo“ (Hart 1958, 620). Takva konstatacija može biti značajna u odnosu na debatu o prirodi prava, ali zaključak u vezi sa kritikom subjektivne procene se ne menja – u istoj meri i na sličan način se podriva pravna sigurnost. Osim toga, Hart dobro zapaža da i kroz misaoni eksperiment u kojem bismo odbacili moralni relativizam i rekli da se vrednosti mogu razumno opravdati kao istinite, i dalje bismo se našli pred zakonima koji važe, uprkos tome što su dokazivo nemoralni (Hart 1958, 626). Kao odgovor na to, Lon Fuller, na bazi vere u usmerenost ljudskih odluka ka pojmu dobrog, kao i uz odbacivanje Hartovog stava da i zle namere mogu imati svoju unutrašnju logiku – postulira implicitnu moralnost (moralnost reda), naglašavajući da pravo ne može da se gradi na sebi samom (Fuller 1958, 636, 645). On, opravdano, smatra da Hartovo rešenje nije u skladu sa „težom odvajanja“, jer je nužna implikacija retroaktivnosti upravo odsustvo važenja tih zakona po kojima je muž osuđen, što premešta težište fokusa sa pitanja pravne prirode – na pitanje da li bi prljavi posao trebalo da obavi sud ili zakonodavstvo (Fuller 1958, 649). Ako se dilema postavi tako da se mora birati između manjeg od dva zla – s jedne strane, nemoralnog prava, a s druge strane, lične moralne dužnosti da učinimo šta mislimo da je ispravno – dilema ni ne postoji. Odvojenost prava i morala negira postojanje veze između obaveze da

se poštuje pravo i ostalih moralnih obaveza (Fuller 1958, 656). Time što bi se Radbruchova formula poricanja zamenila tvrdnjom da je zapravo reč o pravu, koje ne treba da se primeni zbog moralne nepodnošljivosti – ništa se ne bi promenilo. „Moralna zbunjenost bi dostigla svoj vrhunac kada bi sud odbio da primeni nešto što priznaje za pravo, a profesor Hart ne predlaže takvo „suočavanje sa istinom“ za sudove“ (Fuller 1958, 655). Interesantno je da, s obzirom na svoj teorijski okvir u čijem je centru sudija, Hart bira retroaktivnost. Da je sudije stavio pred pomenutu dilemu, morao bi da odgovori da li se razlikovanje između važenja i odbijanja primene prava iz moralnih razloga odnosi i na sudije (Jovanovic 2013a, 158). Pred kraj, zaključuje Fuller, nije zapanjujuće da diktatura ogrnuta u pozitivno pravo, koja je otuđena od „moralnosti reda“ i „unutrašnje moralnosti prava“ – prestaje da bude pravni sistem¹⁵. Kao konkretno rešenje za pomenuti slučaj, on bi takođe odabrao retroaktivnost, ali samo zato što bi se time napravilo oštro raskidanje sa prošlošću, što bi omogućilo sistemu da se brže oporavi (Fuller 1958, 660–661).

3.3. Hans Kelzen i Džon Rols

Osim toga, definisanje pravde kao jednakosti na Radbruchov način je samo jedna perspektiva. Kao alternativa tome – Kelzenova i Rolsova analiza pravde (u ograničenom okviru) će ukratko biti uzete u obzir. U oba slučaja postoji saglasnost sa Radbruchom oko toga se pravda tiče međuljudskih odnosa (iako Rols ne smatra da se ona svodi samo na to), pri čemu Kelzen pravedni poredak određuje kao poredak koji zadovoljava svakoga u okviru njega, određujući pravdu, čini se – pomalo neprecizno, kao društvenu sreću (1998, 137). To se može pojasniti kroz stav da princip pravde svoj materijalni supstrat dobija tek kada se odredi kroz neku moralnu perspektivu, što dalje dovodi do toga da u slučaju ostvarenja tih vrednosti – pojedinac ili društvo biva ju zadovoljni/srećni. Suština Kelzenovog razmatranja je u tome da se, polazeći od istih premisa kao i Radbruch, ne može odrediti objektivnost pravde; pojam sreće je podjednako subjektivan, koliko i sama pravda, čak iako se uvede Bentamova ideja sreće najvećeg broja ljudi (1998, 138). Zato, ideja sreće mora da doživi metamorfozu – mora postati socijalna kategorija, odnosno usmeriti se ka zadovoljavanju društveno

¹⁵ Ovde se navodi da se tom pozitivističkom pristupu mora usprotiviti princip „višeg prava“, koji se odnosi na prirodno pravo (Fuller 1958, 660).

priznatih potreba¹⁶ (Келзен 1998, 139). Isto tako, društveni poredak će važiti kao pravedan – ako garantuje individualnu slobodu, a pošto je negativna sloboda, od prinude i od vlasti (u hipotetičkom, apsolutnom vidu¹⁷), nespojiva sa idejom društvenog poretka, onda ovde mora biti reč o drugačijoj slobodi – slobodi kao vlasti većine. Na taj način dolazimo do samoodređenja demokratije, kroz koju se ideja pravde pretvara u „društveni poredak koji štiti određene interese, one, naime, koje većina potčinjenih tom poretku priznaje kao vredne zaštite“ (Келзен 1998, 139). U svojoj daljoj analizi, Kelzen kritikuje i uobičajeno poimanje pravde kao jednakosti pred zakonom – ističući da to ne znači ništa drugo nego „da organi koji primenjuju pravo ne treba da prave razlike koje ne pravi samo pravo koje treba primeniti“ (1998, 148). Takvo tumačenje se čini tačnim, jer ako zakon odredi da se politička prava ili religijske slobode daju, recimo, samo jednom polu – onda bi se pravednim smatralo prosto isključivanje drugog pola iz datih sloboda. Ali, pita se Kelzen na kraju, koji je onda moralni princip pravde? Iz relativizma se jedino može izvući princip tolerancije, ali samo u okviru jednog pravnog poretka koji je regulisao mir, odnosno zabranio bilo kakvu formu nasilja (Келзен 1998, 154–156).

Sličnu liniju razmišljanja prati i Rols, utemeljujući pravdu na nepristrasnosti – iako na samom početku svog izlaganja naglašava da se zahtev pravde ne može poravnati time što će se na uštrb pojedinaca obezbediti većini da učestvuje u „dobru“¹⁸. Ostvarenje vrednosti većine nije ispunjenje pravde u potpunosti, ali se možda može prihvatiti, u nedostatku boljeg rešenja (Rols 1998, 22). Polazeći od toga da, zbog različitih moralnih perspektiva, u svakom društvu postoji sukob pojedinačnih interesa – Rols pravdu gradi na principu izvorne saglasnosti. On se bavi posebnim vidom pravde, oličenim u principima koji bi trebalo da postave okvire za bilo kakav pravni ili moralni sistem. Slobodni pojedinci te principe vide kao unapređenje svojih interesa, ako bi se prihvatili u početnom položaju jednakosti (Rols 1998, 28). Takođe, ti isti principi bi trebalo da urede sve dalje sporazume, saradnje i oblike vlasti. Kao što svaka ličnost, kaže Rols, treba da promisli šta za njega predstavlja pojam dobrog, tako i grupa osoba (društvo¹⁹) mora

¹⁶ Iako se ni tada ne menja ontološka osnova sreće, odnosno u krajnjem ishodu nas vraća na Bentamovo rešenje. Tačnije, takvo određenje ne prevazilazi subjektivnost, ali joj kroz saglasnost i kolektivnu vrednost daje legitimnost.

¹⁷ Prim. aut.

¹⁸ U vrednostima koje se poklapaju sa njihovim moralnim sistemom.

¹⁹ Prim. aut.

da odluči šta se smatra pravednim (1998, 28). Taj prvobitni položaj jednakosti odgovara hipotetičkom prirodnom stanju kod društvenog ugovora, što znači da nisu određeni klasni položaji ili društveni statusi, kao ni raspodela dobara – niko nije u boljem ili lošijem položaju zbog prirodnih mogućnosti ili društvenih slučajnosti. Naravno, ne uzima se pomenuto stanje u bukvalnom smislu, niti se očekuje utopijsko stvaranje takvog društva, već se prosto zaključuje da treba težiti ka pravdi u vidu nepristrasnosti – ka „društvu kao voljnoj shemi“ (Rols 1998, 30). Pojam pravde je određen ulogama tih principa, što se izražava kroz zapažanje da ispravnost prethodi dobrom. Treba još naglasiti da Rols pravdu ne izjednačava sa nepristrasnošću i u preispitivanju principa na kojima bi društvo moglo da počiva, dolazi do sledećeg predloga: prvi princip je da svaka osoba treba da ima jednako pravo na najširu shemu jednakih osnovnih sloboda, dok drugi princip kaže da društvene i ekonomske nejednakosti treba da se urede tako da je istovremeno razumno očekivati da budu svakome od koristi, i da su povezane sa položajima koji su otvoreni za sve. Time odbacuje prvobitnu pretpostavku principa korisnosti (zadovoljenje pojedinca kroz algebarski zbir dobiti), jer takav princip ne vodi računa o tome na koji način se zbir zadovoljstava raspodeljuje na pojedince (Rols 1998, 40, 70). Značajno je napomenuti da su za njega uloga intuicije i zdravog razuma ključne pri određivanju pomenutih okvira, kao i da nije porekao mogućnost da društvo izabere korisnost kao princip (Rols 1998, 39, 43, 47, 56–60). Ipak, pojmovi osnovnih sloboda, intuicije i razumnog očekivanja koristi za sve – se čine poprilično nepreciznim, te Rolsovi principi neće biti uzeti u ovom radu kao poželjno rešenje.

Posle svega navedenog – bilo bi najdoslednije poći od neke vrste utilitarističkog shvatanja da je slobodan odabir većine pojedinaca u određenom društvu jedini opravdan, sa svešću o neophodnosti moralnog pluraliteta, kao i nemogućnosti praktične primene potpune saglasnosti jednog društva.

3.4. Predlog rešenja

Pre iznošenja predloga, neophodno je prvenstveno ukazati na jednu važnu dopunu pitanja granice nepodnošljivosti, koje se krajnje određuje pojmom ljudskih prava, a za koju saznajemo iz Radbruhog posthumno objavljenog rada. Naime, kroz učenje o „prirodi stvari“, koja bi trebalo da bude rukovodna ideja za zakonodavca, Radbruh olakšava oštrinu metodskog dualizma – ukazujući na to da je ta „stvar“

materija koju pravo treba da oblikuje, što zapravo čine zajednički život ljudi, ukupnosti okolnosti i životnih poredaka u okviru društva (1990, 220), dok je „priroda“ objektivni smisao te materije, koji treba izvući iz samog sklopa životnih odnosa (1990, 222). Problem se, nesumnjivo, nameće kroz već spomenutu subjektivnosti odabira jedne od tri grupe vrednosti, jer se ciljevi prava razlikuju u zavisnosti od osećaja za pravdu (ispravnost), shvatanja države i partijskog opredeljenja, religije ili pogleda na svet (Radbruch 1965, 28). Etički osećaj za obavezu (trebanje) je nužno odluka slobode i zato ne može pravo da nametne moral, već ono može samo da ga omogući – pravo je mera bez koje se unutrašnja sloboda moralnih odluka ne može ostvariti. Upravo zato je, smatra Radbruch, neophodno garantovati *ljudska prava*, nezavisno od različitih vrednosti i uređenja, jer su ona „*absoluter Natur*“ (apsolutna priroda) svakog pravnog sistema (Radbruch 1965, 29). Vrednosni odnos između individualizma, nadindividualizma i transpersonalizma određuje distributivna pravda, ali ukoliko dođe do potpune negacije ljudskih prava – radiće se o potpuno neispravnom pravu. Na ovaj način biva uveden moralni minimum prava, koji bi najpre trebalo okarakterisati kao „prirodno pravo sa promenljivom sadržinom“, jer se ono razlikuje od klasične doktrine prirodnog prava, koje zahteva univerzalno važenje nekih vrednosti, nezavisno od mesta i vremena (Jovanovic 2013a, 160). Međutim, postavlja se pitanje o kojim pravima je reč? Pred kraj, Radbruch i na to daje odgovor, uvodeći pojam „humanosti“, kao i „ljudskog dostojanstva“, predstavljajući istovremeno jedan koncizan osvrt na istoriju razvoja tih pojmova (Radbruch 1965, 97–98). Zatim precizira na koje načine bi pravo trebalo da ostvari ljudsko dostojanstvo: kroz garanciju spoljašnje slobode, inkriminisanje zločina protiv čovečnosti (odnosno čovečanstva), kao i zaštitu pojedinaca od arbitrarnog kažnjavanja – naglašavajući Listovu²⁰ ideju da krivično pravo ne bi trebalo svoju svrhu da pronalazi samo u zaštiti društva od kriminala (Radbruch 1965, 99). To je kasnije, u sličnom obliku, usvojeno u okviru jedne od najvažnijih međunarodnih deklaracija – „Univerzalne deklaracije o ljudskim pravima“²¹ (Jovanovic 2013a, 161). Povrh toga, zanimljivo je istaći da se Robert Aleksi u potpunosti slaže sa ovakvim stavom (Alexy 2012, 9–14), kao i ukazati na donekle blisko razmišljanje Harta, kada je reč o određenoj granici koje nijedan pravni poredak

²⁰ Franz von Liszt (1851–1919) – nemački pravnik, kriminolog.

²¹ Universal Declaration of Human Rights, UN General Assembly, 10/12/1948, 217 A (III). <https://www.refworld.org/docid/3ae6b3712c.html>, last visited May 21, 2020.

ne bi smeo da prenebregne. Naime, on naziva „prirodnom nužnošću“ određene osnovne potrebe društva, a to su: zabrana ubistava, nasilja i krađe (Hart 1958, 623).

Ipak, uprkos tome što se sa uvođenjem pojma ljudskog dostojanstva u popriličnoj meri precizira granica i što bi se većina ljudi intuitivno složila sa njom – sledeća modifikacija izgleda kao prikladija i utemeljenija: dati takvo ovlašćenje jednom posebnom, nezavisnom telu – demokratski utemeljenom.

Upravo da bi se zaobišli problemi moralnog relativizma i sukoba različitih pogleda na svet pojedinaca – neophodno je da se formira posebno telo, koje bi imalo isključivo pomenutu funkciju. Prateći izloženi trag Kelzenovog i Rolsovog poimanja pravde, kao i pretpostavke, u skladu sa tim, da pravo kao takvo postoji zarad pojedinaca u zajednici koju pravo treba da uredi – čini se najkonzistentnijim da se demokratski odabrano veće pravnika ovlasti da naredi sudijama da ne primene neki pozitivno-pravni propis, ali isključivo uzimajući u obzir vrednosti, odnosno prava koja bi narod izglasao kao granicu nepodnošljivosti. Možda bi najbolje bilo takvo ispitivanje sprovesti putem referenduma, u okviru kojeg bi glasačima bila ponuđena veoma široka lista prava, koje bi mogli da izglasaju kao „osnovna“, nakon čega bi se po određenoj formuli uzeo presek kao rezultat (uz uslov da je nezavisno od izlaznosti više od polovine građana glasalo za taj krug prava, koji će biti uzet kao relevantan, kao i povremenu obnovu referenduma – kako bi se dala šansa novim generacijama). Time bi se ostvario uslov konsenzualnosti i čini se – mogućnost relativizacije svela na minimum. Danas, sa razvijenim ustavnim sudstvom i međunarodnim pravom, koje formalno obezbeđuje granicu ljudskog dostojanstva – ova tema svakako donekle gubi na značaju. Međutim, institucija Ustavnog suda ima suptilno drugačiju ulogu od ovog potencijalnog tela, jer Ustavni sud procenjuje međusobnu usklađenost pozitivnog prava, dok bi u našem slučaju bila reč o usklađenosti celokupnog pravnog poretka sa nekom vrstom nadzakonskih prava²². Takođe, u vezi sa međunarodnim pravom, može se istaći da uvek može biti upitna efikasna primena istog (kao što je bila u pomenutom slučaju sa Berlinskim zidom²³), kao i da uvek postoji dinamika u borbi za vrednosti – koja bi se izrazila kroz različite oda-

²² Između ostalog, u Hitlerovom poretku je pomenuti zakon „O ukidanju nevolje naroda i države“ suspendovao sva ustavom zagarantovana prava, što ukazuje na potencijalni značaj ovog instituta koji bi trebalo da prethodi ovakvim situacijama.

²³ Vid. str. 12.

bire, to jest izglasavanje raznovrsnih vrednosti. Aktuelna pitanja poput eutanazije, abortusa i ostalih pitanja iz bioetike, kao i veštačke inteligencije i homoseksualnosti su jednostavan primer trenutnih razilaženja (iako se, zbog metoda glasanja – taj krug može proširiti). Recimo, pitanje privatne svojine može biti jedno od tačaka sporenja, kao što se kroz istorijsko iskustvo pokazalo, kao i sloboda govora ili udruživanja. Zato je ovakav predlog potencijalno širi od kruga koji bi pojam ljudskog dostojanstva obuhvatio, što ga čini uvek aktuelnim. Naravno, problem sa ovakvim predlogom se tiče, ponovo, nepremostivog ličnog tumačenja propisa (iako bi merilo tumačenja bilo demokratski određeno), kao i eventualne ekstremne amoralnosti društva, posmatrano u odnosu na uobičajena osnovna ljudska prava koja se danas garantuju. Međutim, i u tom slučaju je važno reći da je jedan od zaključaka rada – da je na samim građanima da kroje sopstvenu sudbinu, pa bi načelno svaki odabir vrednosti bio opravdan.

4. ZAKLJUČAK

Rabruhovi predlozi o pravdi kao vrednosti, koja se u krajnjoj instanci mora učiniti snažnijom od pozitivnog prava, shvataju se kao jedan neverovatan i izuzetno originalan poduhvat, koji se mora ceniti. Nije od značaja da li će pravda prevagnuti putem sudijske neprimene nemoralnog prava, uvođenja zakona sa retroaktivnim važenjem, ili pak samog kažnjavanja lica uprkos tome što su njihova dela saglasna sa postojećim pravnim propisima – važno je da određene vrednosti nikada ne budu povređene. Ipak, čini se da bi u slučaju odbacivanja izloženog *reformisanog rešenja* – odricanje od bilo kakvog iznad-pozitivnog prava bila razumna alternativa. Čak i kada bismo uzeli u obzir Radbruhovu formulu sa kasnije uspostavljenom granicom ljudskog dostojanstva, zbog izložene filozofije i praktične nepotrebnosti danas, deluje da bi bilo bolje osloniti se na pravnu sigurnost, a ostatak prepustiti međunarodnom (pozitivnom) pravu. Pravno-filozofska i politička analiza bi trebalo prevashodno da se usredsređuje na poluge za sprečavanje arbitranog zakonodavstva i vlasti u celini (poput pitanja koja se tiču rešavanja problema predstavničke demokratije, izbornog sistema i efikasne primene zagarantovanih prava), koje bi morale imati preventivnu ulogu, što nas ujedno upućuje i na glavni uslov – demokratsku svest građana. Mišljenja sam da je koren datog problema uvek dublji

nego što bi jedan nadzakonski institut mogao da dopre, iako pod određenim okolnostima verujem da bi mogao da pomogne. Pri tom, trebati uvek imati u vidu da je Radbruch pisao u jednom specifičnom kontekstu i da je značaj njegovog rada i mišljenja ostavio snažan utisak čak i na sudsku praksu²⁴ (Leawoods, 2000, 513–514), što dovoljno govori u prilog njegovoj teoriji. Svaki novi pokušaj da se teorija modifikuje povezan je sa promenjenim okolnostima i problemima sa kojima se savremeni svet susreće, što svedoči o drugačijim dometima i ciljevima ka kojima bi se jedna ovakva ideja mogla kretati. Pomenuti predlog demokratskog tela se naravno odnosi na društvo koje je dovoljno stabilno da bi se predlog uopšte mogao razmatrati, što nije bila situacija u Trećem Rajhu. Ipak, koristeći tuđa iskustva, težimo da doprinesemo poboljšanju uređenja budućih društava, kao i da možda stvorimo jedan novi okvir koji bi bio iznad svakog pravnog poretka, u nadi da bi se na taj način određene vrednosti zaista mogle zaštititi kroz efikasnu primenu navedenog metoda.

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A CRITICAL EVALUATION OF RADBRUCH'S THEORY ON JUDICIARY MORAL RESPONSIBILITY

Summary

Under the influence of the political and historical context in the eve of World War II – Gustav Radbruch, postulated the formula of intolerability and refutation. Through them, he developed his thesis that a judge should not apply laws which are iniquitous, meaning they breach the principle of equality, which is also the core of justice. A problem with such an authorisation inevitably imposes itself through the question of subjectivity of an individual judgement, because justice is evaluated in relation to values. Such a demand of justice does not tell us whom to consider equal. In this paper an attempt will be made to find a solution which would least compromise legal certainty by moral relativism – on the basis of Kelsen's and Rols' ideas of justice, as well as the hypothesis that the goal of law is to serve individuals of the community which it regulates. It will be assessed whether it is more consistent to modify Radbruch's idea, through an independent body with extralegal authorities – grounded on democratic institutes.

Key words: *Radbruch, the intolerability formula, justice, relativism, consensus*

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DISTINGUISHING IN STATUTORY LAW. THE STATUTE AS WRITTEN CUSTOM UNDER MAURICE HAURIU'S LEGAL INSTITUTIONALISM

The common definition of the statutory law, especially in continental law culture, understands a set of regulations supposed to be applicable in all possible cases in the future. Nevertheless, already at the beginning of the twentieth century, this concept was criticized as too idealistic by absolutizing the statute as a unique and exhaustive source of law. Maurice Hauriou (1856–1929), a French academic of public and constitutional law at the University of Toulouse, presented at that time the concept of the statutory law as written custom, therefore a source of law that is supposed to be actualized in particular cases with judge's possibility to distinguish. The modern concept of the statutory law, inherited from the Enlightenment, is proven to be even more mythical. The paper focuses on the Hauriou's concept of the statute as a written custom which can be used as a useful tool to describe the reality of contemporary legal practice.

Keywords: *institutional theory of law, judiciary, Maurice Hauriou, statutory law, written law*

1. INTRODUCTION

The common definition of the statute, forged on the grounds of legal positivism and normativism, understands it as an enactment of legislative authority establishing rules of general and abstract character. It is therefore conceived as a set of regulations that are to be applicable in all possible cases that will occur in the future. Such a concept of legal rules presumes an absolute and reasonable character of the legislator as someone competent to predict and determine all possible cases and their solutions *pro futuro*. This idea constitutes the very theoretical base of the continental law systems, whose core principles are strongly

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influenced by normative approaches in legal science. In these systems, the role of the judiciary is then strongly limited to the strict application of statutory rules. In this regard, they are opposed to the common law systems defined, on the contrary, in terms of *judge-made law*. However, some of those fundamental presuppositions made on the grounds of the normativism thesis cannot be sustained given many contemporary observations about the complexity of legal decision-making processes, its political character and the key role of the judiciary in it. This remark is of course nothing new nowadays, when the juriscentism has been already criticized and proven wrong by many social theoreticians such as Michel Foucault, Jacques Derrida, Jean-François Lyotard, Pierre Bourdieu, continuing the criticism of the cult of reason, started by Adorno and Horkheimer in their *Dialectic of Enlightenment*. Nevertheless, in legal practice the observation that, in short, many of the common presuppositions about the law are fictive and are over-simplifying the nature of legal phenomena, has not yet been fully put to use.

Quite surprisingly, the normative legal theory and the legal positivism as well, whose forerunners were fostering the above-mentioned concept of law, were strongly criticized from the very beginning of the twentieth century – just after the point when socio-legal science in the strict sense got established. It is during this period that Maurice Hauriou, a famous French professor and theoretician of public law, worked. As a great opponent of normativism, he established his own ‘institutional’ theory of law taking into consideration, as other socio-legal studies then, the historical and actual social contexts behind all legal processes. His work and thought, even after a century, can explain the history and the evolution of the modern concept of law and the importance of the legislative work that results from it.

Hauriou (1856–1929) was a French academic of public and constitutional law at the University of Toulouse. The beginning of his career was marked by a strong interest in the history of law and sociology. Since 1888, he dedicated himself to the study of public law, in particular of administrative law. It is in this domain that he received the greatest recognition in the French legal science. His handbook on administrative law, published for the first time in 1892, *Précis de droit administratif*, remains one of the most important works on the subject and is still present in the academic discourse of the French legal science (Patrick Arabeyre, Jean-Louis Halpérin, Jacque Krynen, 2007, 516–519). Apart from that, Hauriou is also known for his theoretical

works concerning constitutional and public law theory. Even if they have been kind of forgotten throughout the past century, they can still reveal a lot on the development of the legal theory in the twentieth century as he inspired such theoreticians as Santi Romano (1875–1947), one of the first writers about the pluralism of legal orders, Neil MacCormick (1941–2009) and Ota Weinberger (1919–2009), well known for their neo-institutional theory of law, or philosophers such as Gilles Deleuze (1925–1995) and Felix Guattari (1930–1992) who developed the idea of materialistic analysis of law (Eric Millard, 1995, 405; Filippo Domenicali, 2016). Hauriou is also reputed to have significantly influenced Carl Schmitt, in particular his concept of law as a concrete order, even if this hypothesis has been proven to be of a rather mythical character (Théophile. von Büren, 2015, 195).

The most important idea of Hauriou's legal theory is his theory of the institution. It is crucial to present briefly this concept, to make understandable the ongoing ideas on the concept of statutory law that he presented. According to the last version of the definition from 1925, 'the institution the idea of a work or an enterprise, which is realized and continues to be realized in the social environment; for this idea, a certain authority is organized which provides its organs; on the other hand, among the following members of the social group interested in the realization of this idea the manifestations of the community are held, led by the authorities and regulated by the procedures' (Hauriou, 1925, 96). Under this theory, law is perceived through the prism of social bodies acting as a part of a more general social order. These bodies – the institutions – are supposed to shape what is finally called the law, which is secondary to the institutions themselves that constitute its origin (Hauriou, 1906, 135–136).

Hauriou's theory is strongly inspired by sociological and historical studies and is one of the examples of the experiment to open up jurisprudence to other disciplines of science that marked the period of his work. According to him, the study of law, as in those sciences, was supposed to be based on concrete facts, events and phenomena, while trying to avoid any kind of abstract notions and reasoning (Mathieu Doat, 2015, 419–420). As a result, Hauriou put forward the idea of thinking about the law as an effect of a very concrete, material process of auto constitution of the society and, in particular, as the proceedings of socially authorized bodies that discuss and elaborate the law in the social environment. Likewise within posterior social construc-

tivism developed for example by Talcott Parsons, Hauriou believed, inspired by French sociology of Émile Durkheim and G. Tarde, that law is a general social institution shaped by the sum of individual acts concerning social relations, defining through their content the social order, directed by some cultural common ideas such as justice or equity. It should then be stressed that, in Hauriou's opinion, given this thesis on the social origin of law, none of the legal formal acts such as statutes can be considered as an absolute source of law, detached from the particular context in which it is produced.

The close relationship between law and social sciences mentioned above, clearly visible in Hauriou's concept of the institution, is an evidence of a more general breakthrough in legal theory at the turn of the nineteenth and twentieth centuries. Its main goal was to emphasize that the concept of legal sources limited only to legal texts, is much too narrow and needs to be extended. Many of the legal theoreticians of that time, inspired by sociology, were claiming that the real source of law is to be sought in the social convictions, representations and attitudes that reflect some general rules governing society. In this regard, institutionalism can be described as a movement in legal theory based on the notion of law as a building tool of the social order, broader than the specific concept of law under the technical legal discourse itself.

It is possible to identify common assumptions of Hauriou's theory of the institution and other institutional legal theories. According to Aristide Tanzi, in crude terms, they can be outlined as a criticism of formalistic approaches in legal science and of the concept of law as a set of rules. These theories see the origin of law primarily in the facts that precede the very act of establishing positive law, e.g. an enactment of a statute (Tanzi, 2004, 2–3). Moreover, they are also critical towards legal positivism, which requires a necessary cause and effect relationship between the law and the actions of a legitimate law-making body, in principle the state. Thus, they open the science of law to other sources of normativity, which are more tightly connected to the social phenomena. These sources include, among others, customs, official practice, politics, but also the large category of social practice (see: Julia Schmitz, 2015, 247; Maryse Deguerge, 2015, 577).

It can then be concluded that legal institutionalism, in general, envisages and presumes a plurality of forms of law. An in-depth description of how differently law can manifest itself in social reality is thus an explicit expression of a strong disagreement over traditional,

dogmatic methods of legal science that reduce its research subject only to statutes and, as a last resort, to the case law. According to Millard, all institutional theories are therefore advocating for an interdisciplinary approach as a legitimate method of legal science, seeing there a response to the complex character of the legal phenomena (1995, 382).

It is also important to mention what position did legal institutionalism take towards other legal theories present in the discourse at the beginning of the twentieth century. One of the ideas most criticized by Hauriou was the concept of the social contract. Even if the theory of the institution does not reject the idea of consensuality as the basis for the legitimacy of power and law, it dismisses the notion of the contract as a relevant description tool for legal science. The fallacy of contractualism consists, according to Hauriou, in the fact that it implies the existence of an ideal, abstract contractual situation and, consequently, reduces the source of power to an individual and to an isolated act of a particular constitutional or electoral institution.

When describing the legitimacy of power, as argued by Hauriou, it is not about the agreement or the contract, but rather about the so-called '*adhesion*', i.e. passive recognition of a particular political and legal order expressed through participation in procedures established by the latter. The '*adhesion*' should not be understood as an individual act of a citizen, but as a social level of acceptance (or even bearance) of the authorities' actions and internalization of the rules established by them. Collective adhesion is a value that can be measured. It is a criterion for distinguishing, what Hauriou calls, perfect law (*droit parfait*). Rules that enjoy the highest level of social acceptance and which are deeply internalized by the citizens are those with the greatest binding force (Hauriou, 2010, 649). Hauriou illustrates the functioning of the institution with the figure of *lex* in roman law, defined by Theodor Mommsen as a proposition of a contract made without the possibility to modify it, the only option for the other party being accepting or rejecting it. This is, according to Hauriou, a pertinent mechanism that, by analogy, describe the nature of the relation between the society built of individuals and the modern state (2010, 211).

Normativism was not the only legal movement targeted by the institutionalists. They were also highly critical in reference to the German statism developed i.a. by Paul Laband, Carl von Gerber and Georg Jellinek. Their theories, called often as the *Herrschaft* doctrine, were based on ontological voluntarism of law, reducing the concept

of sources of law to mere individual acts of competent state authorities. As a consequence, the concept of sovereignty itself was limited to the exclusive competence of the state. This theory was based on the private law concepts relating to the formation of contracts and declarations of will that were applied to public law relations. The State was described, in this regard, by means of the legal personality theory of civil law. Every action performed by state authorities was, therefore, to be treated as an expression of the will of the entire institution of the state, regardless of internal relations that might call this reasoning into question. Under the *Herrschaft* doctrine, the state as a whole was the only legitimate source of law. That was, of course, distinctly contrary to the assumptions of legal institutionalism presented above (Massimo La Torre, 2007, 17–20).

Hauriou's theory of the institution has, on the other hand, something in common with another German legal theory of legal order, developed by Otto von Gierke. According to him, every society should be seen as an organism composed of communities (*Gemeinschaften*), each of them creating their own legal rules. Under this concept, which implies a plurality of sources of law, the only objective and external law – the *quid commune* – is the one which regulates the mutual relations between the separate normative orders of communities. It rejects, just as Hauriou's institutionalism, the concept of a uniform and indivisible sovereignty (Rousseau's *volonté générale*), which results from the radical statist doctrine. Instead, they claim that sovereignty is complex and composed general will.

Not without reason, the idea mentioned above was conceived as an objection to the legal doctrine of the Enlightenment and the French revolution. According to Hauriou, the concept of uniform sovereignty contradicts the idea of the political liberty of every citizen. As he wrote 'the political freedom implies that the nation, within every of its objective particles, should have a share of the sovereignty and that this sovereignty should be exercised not only by central government bodies but also by minor bodies of the social organization down to every ordinary citizen' (Hauriou, 2020, 608). Thus, under Hauriou's legal institutionalism the concept of delegation of power by the nation to the state authorities is seen as dangerous to the people's sovereignty, as it can lead directly to the doctrine of the legislative monopoly of the state.

As indicated above, institutionalism was intended not only as a criticism against certain, past theoretical concepts of the state and law, but also as a contribution to the discussion on the reform of the legal science itself, which took place at the end of the twentieth century. This time was marked especially by the end of the predominance of civil law dogmatism. Since the adoption of the Napoleonic Code in 1804, it was frequently the only legal method taught at universities. The cult of codification limited the legal science to a mere interpretation of law or even, as Christophe Jamin points it out, to only its reading and memorizing (2003, 380–381).

The crisis of the aforementioned concept of law was caused mainly by two factors. The first of them was the intense social transformation process of the nineteenth century. The second, that was taking place on the strict ground of law, was the development of administrative law related to the rise of the modern concept of the state. The social changes mentioned above, which lead to a structural reconstruction of society, the emergence of the working class and the rise of corporate movements put into question the universality of Napoleonic codification: having at its core an axiology strongly imbued within the philosophy of individualism, it had become more and more outdated. Despite numerous attempts to reform it, the lack of sufficient political will to enact the new code shifted the burden of the adaptation of written law to the changing social reality onto jurisprudence.

The discussion regarding the shape of the legal science was, in fact, broader and was held also during the International Congress of Lawyers organized within the World's fair of 1900 in Paris. It should be mentioned that it was also at this time that the American concept of legal realism emerged, encouraging lawyers to 'leave the libraries' and study the law 'as it is in reality'. However, the final solution adopted was, with few exceptions such as the works of Hauriou and Léon Duguit, an adaptation of the method proposed by Christopher Langdell from the Harvard University, that limited the new approaches to the legal methodology only to the case-law studies, based on the presumption that it can reveal some general principles of law which manifest themselves in practice (Jamin, 2003, 384). Nevertheless, the end of the nineteenth century was a time of a clear breach of the tradition of the predominance concerning the strictly linguistic legal interpretation approach, fostered i.a. by the French school of exegesis. It was then pos-

sible for the new generation of legal theoreticians, such as Hauriou, to propose more interdisciplinary approaches to legal science, based, for example, on the methods used in history or social science.

Therefore, Hauriou's legal theory, taking into consideration the context of its origin, was destined to provide concepts and manners of description of law in the social reality, trying to demystify abstract terms that are, till today, omnipresent in both theoretical and practical legal discourse. The central notion of this theory, the institution, constitutes a concept meant to be applied not only to the state, but to a more general figure of any social organization. It is, according to the definition formulated by Hauriou 'a category that is durable, continuous and real' (1925, 89). The process of the foundation of the institution is something basic and inherent for the society as an organization. The validity of social norms is then determined in reference to its persistence through time. In Hauriou's view, the law is not based on a subjective will of a person or even a social body, as claimed by most of his predecessors, nor on its transcendent and objective nature. It is a result of social activity that consists of individual facts of repeating and imitating actions of other individuals, motivated by the will to perpetuate an idea. Within this process, the individuals are presumed to be free in their choice to adhere or not to the idea in question. As a consequence, the main object of legal science should not be legal provisions and abstract rules, but socially recognized values and social representations that are determining people's actions in an organized community. For Hauriou, legal rules are, of course, important, but they should be seen as something secondary, allowing the legal order to change, while diminishing the importance of seizing it in the form of a legal text. Thus, Hauriou's institution can be described both as something already *instituted* and complete (a statute or legal decision) and as *being instituted* (constant actualization of the signification of values such as liberty or equality).

Having the basic notions of Hauriou's theory and epistemology of law it is possible to move on to his concept of the statutory law, strongly critical towards normativism (I). Then I would like to present the modern idea of legislation, as a rational tool of social change, and its decline (II) in order to argue why Hauriou's concept of statutory law can be useful nowadays, to cope with the ongoing changes in legal culture and legal *praxis*.

2. HAURIUO'S CONCEPT OF STATUTORY LAW

As for the role of judiciary, in his *Précis de droit constitutionnel* (1929), Hauriou argued that absolutizing the concept of the statutory law as set of general and abstract rules oriented towards the future, is one of the dangerous ideas inherited from the ideology of the French Revolution, based on the notion of the absolute and general will of the nation expressed by the legislative. In fact, as believed by Hauriou, the statutory law should not be considered as something more than a work of codifying customs – accepted and repeated solutions to the cases encountered in the past. The legislative is then, like any other human being and human institution, limited in its capacity of predicting the future and all of the possible particular situations, impaired in its heuristic horizon mostly to what has been already a subject of law or legal decision-making process. In the above-mentioned work he described written law in the following way:

‘It must, therefore, be admitted that written laws and organic laws regulate only in a present-day manner certain elements of the State, certain elements and certain procedures, but that the institution of the State, considered in its profound realities and its fundamental balances, continues to be legally sanctioned by a customary con.,auriou, 1929, 95).

The real nature of the statutory law is then constituted by customary consent that is at the source of its validity and normative force. For, as argues Hauriou, the statutes would be nothing but sheets of paper without the social recognition of their content, values that they express and their author – an institution of minority power (*pouvoir minoritaire*), primarily the State, the law-making process actor and its host (1929, 591). It is, by the way, important to mention that Hauriou's model of power inverts the traditional scheme of the governed individuals transferring their power to the group of their governing representatives (Eric Maulin, 2015, 534–535). As mentioned above, Hauriou argues that this vision is fallacious and proposes his own schema based on the idea of social recognition and acceptance of particular social groups and organizations pretending to have power over society. They have to be constantly assured of having enough *customary consent* backing their enactments which are temporarily and logically prior. That is why he considers every legal act, as the statutes for

instance, as secondary regarding the social general adhesion (*adhésion*), mentioned in the introduction, to values and postures that they realize (Hauriou, 1910, 211).

Hauriou articulates the idea very distinctly: ‘the common law, it is essentially custom and not the written law’ (1929, 225). The idea of the statute law as an ideal form of law-making practice is, in his eyes, ‘a fruit and a sin’ of the Revolution, that aimed at banishing the old legal system, too dispersed, heterogenic and complex, trying to replace it by the new unified legal order composed of statutes. Nevertheless, Hauriou does not condemn the idea of the statute itself completely. He underlines the importance of the statutory law regarding the principle of equality, which is manifested less within the system of multiple particular decisions of customary law. Nevertheless, he was very critical towards any attempt of absolutization of the statutory law technique. He argued that the strict normativism, conferring the primary role to written law, can be dangerous in the inverted direction: the statutes can overgeneralize the reality and create some sort of ‘abstract man’ and impose it with force, whereas the idea of justice, as he claimed, requires, from time to time, some differentiation (Hauriou, 1925, 235).

Having made the above-mentioned observations, Hauriou does not reject statutory law, proposing only a more cautious approach. In order to proceed prudently with the statutory law, both in law-making and legal decision-making processes, he considers statutes, in the first place, as a work of codification of customs gathered in one document, then as an attempt to present them in the form of general and abstract rules. So, in fact, the statutory law is destined to simplify the legal order and not to change its very nature balancing between the general and the particular in the scope of equity, which in the tradition of European legal culture remains the key value of the law. Apart from that, Hauriou claimed that the statutory law incorporates also another component. As he argued, the second dimension of written law is to express the social will of change necessary to assure the liberty, because, as he said in the second edition of *Principes de droit public*, ‘the freedom does not go without a certain possibility of change’. The scope of the modern law, according to his theory of institution, is to assure the indispensable balance between the forces of stability (*forces de stabilité*) and the revolutionary forces (*forces révolutionnaires*) both present in the complex and dynamic social order (Hauriou, 1916, 10–11).

Having this perspective on the role of the law as a means to balance the dichotomic forces of conservation of the established order and the will of the social change, Hauriou distinguished two aspects of statutory law. As he said, 'the law is a historical combination of regulation and custom', then a junction of the regulation, as an expression of the governing power will projecting an outline of the new order to be, and, on the other hand, of the custom having its normative force based strongly in general social *adhesion* (Hauriou, 1916, 27–31). Despite all of that, it is important to stress that Hauriou defined the statutory law, first and foremost, as a law-making technique. According to him, its advantages are, among others, its written form that is easy to be found (and it's even more pertinent nowadays with the internet) and interpreted (for its synthetical character). Hauriou's vision of statutory law remains at the same time based on some sort of a materialistic analysis of this process – as he claimed 'a law is manufactured as an industrial product, through various devices and following a wire rope' (Hauriou, 1910, 150–157). In his theory, he stressed the fact that the positive law can only constitute some sort of approximation of the ideal law but will never become ideal itself, something which is not consistent, nor entirely comprehensive as a system (Didier Mineur, 2015, 63). The statutory law is therefore no longer the expression of the abstract reason, but an effect of a complex process of its elaboration through conceptualization and then its application by the judiciary (Doat, 2015, 415).

The concept of the statutory law present in Hauriou's works can be demonstrated through an analysis of how he argued in favor of the permanence of the Declaration of the Rights of Man and of the Citizen from 1789, which, at the time of the Third Republic, when Hauriou lived and worked, was no longer formally a part of the French legal normative order as a statute made during the period of another political era. In fact, in order to prove that the Declaration remains in force, he argued that it is not the text itself that was formally still binding, but the fact that the French society has profoundly adhered to it and internalized its principles made it still valid for the legal discourse. As he said, 'there are many fundamental principles that can form constitutional legitimacy, situated above the written constitution. (...) Apart from the Republican form of government, there are many other principles for which there is no need for text because it is proper for the principles to exist and to be in force without a text' (Hauriou, 1929). In this vision, the text itself is only a material tool and the statutes are

only examples that can be helpful for those who apply the law to extract its true meaning, just as it was the case for customary law, before the advent of the modern concept of the statutory law which I will describe in the next part of the article.

3. THE ADVENT OF THE MODERN CONCEPT OF STATUTORY LAW AND ITS DECLINE

Hauriou's concept of the statutory law must be analysed in a broader, more general context of the legal philosophy of written law. It seems that it is precisely the modern concept of legislation, elaborated by the philosophy of the Enlightenment, that he stands clearly against. According to Denis Baranger, the concept of the statutory law is linked in its essence to the 'constituent feature of our historical and social consciousness, a way of our political existence – that we aspire to give ourselves our own laws' (2018, 12). The cultural practice of law-making can then be considered as a strict application of the philosophical project of the Enlightenment based on the notion of the autonomy, i.e. 'the fact of governing ourselves by our own laws'. And it is precisely during this period, fully convinced of man's rational nature capable of analysing the world and extracting the general and universal laws that govern it, that the modern concept of legislation could emerge.

The key fact about this concept of the man-legislator is that it was, in its very origin, a philosophical and speculative project based on the assumptions of human nature which came to be after a concrete venture of law-making. As argued by Denis Baranger, this modern political philosophy got subsequently realized as real, practical, or even technical cognitive enterprise oriented towards social change (2018, 15). The statutory law, as a practice already known in history before the Enlightenment, gained a new meaning and a key role in the modern law-making theory. The statutes, in the course of the past two centuries, have become the most important tool of political power. This process was, in the origin, stimulated by the fear of tyranny. The idea of being governed by some universal, general and abstract laws – resulting from universal human reason possessed by every human being – was seen as a possible remedy to escape the necessity of being governed by some other man and to preserve the postulated equality of citizens.

The modern concept of statutory law was, obviously, far from homogenous. It is possible to observe two main tendencies. The first, conceiving the legislation as an act of cognition, and the second as an act of human will. In the works of Jean-Jacques Rousseau or Montesquieu, the law-making is described in terms of an art of discovering universal truths that govern social life. The political activity is then an exercise that consists in going beyond the particular and thinking about what is good and just for the whole community in general. The second way of conceiving legislation admits that law is an act of will of those who govern. The law as an act of will becomes, under the philosophy of the Enlightenment a work of projecting social change based on reason and empirical science. This way of thinking is particularly present in the thought of utilitarian philosophers such as Jeremy Bentham or Cesare Beccaria, who were describing the statutory law as a means to regulate and structure social reality for the purpose of assuring better life conditions for all the subjects of the law-making power.

Nevertheless, in the course of the nineteenth and particularly twentieth century, the concept of the statutory law turned out to have been largely, or even excessively idealistic. Denis Baranger indicates many problems of the written law that allowed him to qualify the contemporary statutory law condition in terms of a 'deceived love'. The law has strongly devalued. It has become a political illusion that is difficult to understand and is, contrary to the idea in the origin, too complex. There are too many laws and, in the end, it seems to have lost his efficiency and even its legitimacy (2018, 10–11). The law is not consistent and comprehensive, no matter how intensively many of the legal theoreticians try to defend the logical character of the legal discourse. All those problems are visible when we take into consideration, for example, the development of the constitutional review and, in general, the more and more important role of the judiciary as a response to the deficiencies of the statutory law.

To sum up, as is defined by Jean-François Lyotard (1979), the history of the modern idea of the concept of statutory law appears as a story of the rise and fall of a grand narrative. The great concept of the statutory law as the supreme source of general and abstract rules, having reached its top in the doctrine of normativism, had to submit itself to changes provoked due to the urgent needs of legal practice. In order to maintain justice, nowadays, the role of the statutory law is to be interpreted with many restrictions, which is clearly visible in the judiciary

dimension of legal practice, in particular within the constitutional and international courts where the relations between politics and the law, often underestimated in all democratic societies, are the strongest.

However, in some contexts the paradigm of the statutory law as an absolute law source turns out to be less obsolete as argued above. In fact, there are some tendencies that, even though rejecting the primary role of law in the sense of legal normativism, are clearly based on the paradigm of the absolute character of the statutory law. It is, for example, within constitutional populist, explored by i.a. Paul Blokker, that this idea returns as a consequence of the sovereignty rule (2019, 14–17). According to the author, the legal populism, critical toward liberal understanding of the rule of law, highlights the importance of statutes as an expression of the general, homogenous will of the nation. This problem, while a very interesting attempt to restore the absolutist statutory law concept by returning to the political voluntarism and the sovereignty paradigm, cannot hide the truth about the complexity and multi-faceted character of legal phenomena. In this respect, in my opinion, the observations of Hauriou (and of many others afterwards) remain in force as a critical and reflexive contribution to the legal theory, particularly within the continental law culture.

4. CONCLUSION

In my opinion, the concept of the statutory law as written custom, presented by Hauriou, could be applied in the analysis of the contemporary jurisprudence and in the theory of law. Under Hauriou's institutionalism, the statutory law is described taking into consideration all of the heuristic limits of the figure of the legislator and the interferences resulting from the strict materialistic and discursive nature of the process of law-making. Understanding statutory law as written customs, while viewing the very nature of law as something turned to the future but also anchored in the experiences of the past, can help us understand why it is sometimes necessary to let the judiciary 'step into the shoes' of the legislator.

As mentioned above, the contemporary legal practice, in which the role of the constitutional and international law courts is, without any doubt, crucial for the functioning and the consistency of all of the modern Euro-Atlantic legal systems, is clear evidence of the imperfect

nature of the statutory law itself. Even if there are some concerns, even criticisms about the judicial activism, when taking into account Hauriou's allegations against the positive, written law, we should be aware that the very nature of law is essentially based on the balance between the past and the future, the abstract and the particular, something pre-determined on one hand, but needing further determination on the other. The decline of the modern absolute concept of statutory law is clearly observable also in the emergence of numerous forms of normative sources that are generally called *soft-law*.

To sum up, the institution of *distinguishing*, rejected in the course of the nineteenth and the twentieth centuries in the continental law culture as contrary to the principle of people's sovereignty and legality, could be, in my opinion, restored as a useful tool of description of how the law works in practice, even within those legal orders where judges are supposed to be bounded by the statutes. For, as I think, there is a great potential, and sometimes also an urgent need, to *distinguish* a case and bend the statutory law in force, in order to maintain justice as claimed by those who are subject to all legal processes.

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